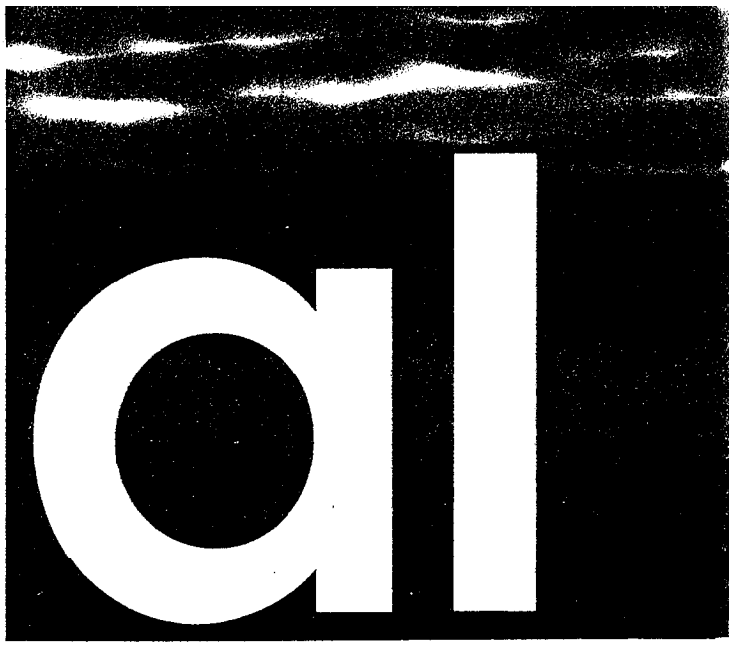

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PRIVACY PROTECTION IN THE PRIVATE SECTOR: THE FEDERAL GOVERNMENT'S DISCUSSION PAPER

*Moira Paterson**

Paper presented to AIAL seminar, Private sector privacy, Melbourne, 26 February 1997.

Background

Late last year the federal government took its first step towards giving effect to its election commitment to work, as a matter of priority, with industry and the States to provide a co-regulatory approach to privacy within the Australian private sector which was comparable with "best international practice".[1] The Attorney-General's Department released a Discussion Paper *Privacy Protection in the Private Sector*[2] which contains detailed proposals for the introduction of a co-regulatory scheme based on the existing structure of Information Privacy Principles together with provision for the development of binding Codes of Practice. It is the aim of this paper to explore the rationale for extending the *Privacy Act 1988* (Cth) to cover those parts of the private sector that are not already subject to provisions in Part III which govern the credit reporting industry and to provide a brief overview of the scope of the proposed regime.

It should, however, be noted that the Discussion Paper specifically states[3] that the level of detail which it provides is intended to provide for an opportunity for feedback on a wide range of issues and should not be taken as an indication that the Government has taken a firm view in relation to any specific matters. This point was again emphasised by the Attorney-General in a speech which was presented on his behalf at *The New Privacy Laws: A symposium on preparing privacy laws for the 21st century*, in Sydney on 19 February 1997. It is therefore not unlikely given the large number of submissions that have been received and the intensive lobbying that is taking place behind the scenes that any Bill which eventuates will be quite different from the scheme which it proposes.

Why a private sector Privacy Act?

The rationale for the proposed reforms consists of a curious mixture of human rights and economic concerns which have their origins in the perceived impact of technological developments and in the increased blurring of distinctions between the public and private sectors.

First, and most significantly, the ever accelerating pace of technological development has led to increasing public concerns about personal privacy as demonstrated in a number of public opinion polls. For example, a recent survey commissioned by Mastercard International showed that Australians were concerned about a wide range of privacy issues and, in particular, about the sharing of information between government agencies and between different financial institutions.[4]

These findings, which are similar to those in other polls both in Australia[5] and overseas[6], stem not simply from the rapid pace of technological change but also from the changing nature of the threats to privacy which this poses. Not only have

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personal computers become cheaper (and therefore more prolific) and much more powerful but they are now interconnected so as to form a global information infrastructure. This makes it both feasible and attractive for businesses as well as governments to conduct surveillance on a massive scale. Whereas once the main concern was with Big Brother, it is clear that there are also increasing threats posed by the surveillance activities of "Little Brother". Moreover, although the latter may appear to be less sinister given that it is more likely to be concerned with market power than political power, there can be a blurring of the distinction between legitimate marketing strategies and more aggressive attempts at manipulation (as evidenced for example in the context of telemarketing) and there are also concerns about the potential long-term harm that may arise from adverse profiles, whether correct or incorrect.[7]

Moreover, privacy is threatened not only by the potential for large scale transfers and data matching but also by the information which is now routinely gathered as a by-product of that process. There is therefore a need to protect not only the content of information that is being transmitted across the information highway but also the footprints which are created by that traffic.[8] For example, the disclosure that a person visited a particular site may be as much a threat to their privacy as the disclosure of the content of his or her transactions.[9]

As noted by Collin Bennett, the central role of information in our post-industrial economy and the increasingly complicated relationships between individuals and those with the power to manipulate information are at the root of data protection concerns.[10] Information technology not only provides a potential tool for abuse of power but "accentuates the dehumanising and alienating aspects of modern mass society and information technology" contributing to an uneasy sense that "someone out there knows something about me".[11]

These developments create obvious human rights issues. Privacy, although notoriously difficult to define, is without doubt a commodity that is very much valued in our individualistic liberal democratic society. It is therefore increasingly accepted as being a human right or at least a precondition for the effective exercise of other more traditional human rights. In fact it is arguable that we have international obligations arising under the International Covenant on Civil and Political Rights to ensure its adequate protection.[12] The reason why the specific topic of data protection did not feature more prominently on the human rights agenda in past years arguably has much to do with the fact that large-scale surveillance activities have only become technically and economically feasible in recent years.

For reasons which I will explain, the same factors have made privacy protection a matter of concern to business. The economic pressures for reform come from two separate directions - the need to ensure that initiatives involving the use of new technologies are not hindered by public concerns about potential privacy invasions and the need to ensure that the free flow of information into Australia is not hindered by transborder data flow (tbf) restrictions in overseas privacy legislation.

Concerns about the former have been a significant factor in prompting data protection initiatives in Victoria. The Treasurer and Minister for Multimedia, Alan Stockdale, in announcing the formation of Victoria's Data Protection Advisory Council, noted that the success of the proposed electronic service delivery system would largely depend on Victorians trusting that the information which they sent "would not be misused or accessed by unauthorised persons". In a similar vein a recent US Government report has noted that "if consumers feel

that their personal information will be misused or used in ways that differ from their original understanding, the commercial viability of the NII could be jeopardised as consumers hesitate to use advanced communication networks".[13]

In the case of the latter, concerns have been fuelled in particular by the recent EC Directive which requires member states to impose restrictions of the outflow of personal data to countries which do not have adequate privacy regimes, but it should also be noted that two neighbouring countries, Hong Kong and Taiwan have enacted privacy laws which contain similar measures.[14] In addition, the Canadian government has made a commitment to extend its privacy laws to the private sector[15] and may well include transborder data flow restrictions in any such legislation.[16]

The EC Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which was finalised in July 1995, requires member states to amend their laws within three years so as to prohibit the international transfer of personal data unless the transferor is able to ensure that adequate standards of privacy protection will apply.[17] If Australia does not extend its privacy regime to the private sector, then any business within the EC which wishes to send personal data to an Australian business would be required to ensure that it satisfies the criteria for exportation to countries which lack adequate privacy safeguards. In most cases this would require the imposition of contractual safeguards, a potentially costly exercise which is likely to place Australian businesses at a competitive disadvantage vis a vis those in countries such as New Zealand which have adequate private sector privacy laws.

Another justification for the extension arises from the need to protect the large body of personal information which is held by the many private organisations that are now performing what were once regarded as government functions. This development has resulted in part from the privatisation of bodies which were once within the umbrella of the Privacy Act and in part from the trend towards the outsourcing of government functions which has occurred as the government implements policies designed to downsize and thereby improve the efficiency of its operations.[18] Furthermore, as the boundaries between the private and public sectors have become more blurred there has been an increase in the outflow of personal information from the public to the private sector. There are also many examples of apparently irrational anomalies. For example, a person may have a right of access to his or her medical records in the possession of a public hospital but not a private one even though there is no inherent difference in the type of information or the circumstances in which it was generated. Likewise, the employment records of federal government employees are protected by the Privacy Act whereas those of other employees receive no equivalent protection.

Two final factors which are of particular relevance to business are the need to ensure uniformity in the face of proposed initiatives by individual states[19] and the desire of those businesses which have taken active measures to protect personal privacy to reduce the potential for less reputable players to tarnish the reputation of their industries.

The Discussion Paper

The scheme which is presented in the Discussion Paper follows the co-regulatory approach used in the New Zealand *Privacy Act 1993* which became fully operational in the private sector in mid-1996. It basically provides for an extension of the Information Privacy Principles (IPPs) which presently apply to the public sector under the *Privacy Act 1988* but with provision also for the making of legally binding Codes of

Practice to operate in place of the IPPs. This scheme provides for data protection via the imposition of general standards rather than detailed prescriptions of conduct while allowing for those standards to be modified in respect of specific industries or specific types of information.

Who does it affect?

The Privacy Act is to be extended to cover all individuals and organisations, whether incorporated or not, in the private sector as well as all of the Commonwealth public sector.[20] It does not, however, apply in respect of persons who hold information in a domestic capacity in respect of personal, family and household affairs.[21] The two main types of records which are likely to be affected by the proposed extension are customer data (including past, current and potential customers) and employee data.

Employers are to be required to take all reasonable precautions and exercise due diligence, including taking account of possible thoughtlessness, inadvertence or carelessness on the part of employees and agents and will be vicariously liable for any breaches which occur in the absence of such measures. As one might expect, employees and agents are to be individually liable in other cases.[22]

What aspects of privacy does it regulate?

Data protection

The scheme provides for enforceable privacy protection in respect of all manual and automated records which contain personal information.[23] The terms "personal information" and "records" follow the terminology which is used in the existing *Privacy Act*. "Personal information" is defined as meaning any information or opinion about an identifiable individual or one whose identity can reasonably be ascertained. The information or opinion does not have to be recorded in a material form and does not necessarily have to be true in order to fall within the definition. The term "record" is not confined to documents but also covers data bases, photographs and other pictorial representations. It does not, however, include generally available collections of letters and other articles while in the course of transmission by post.

Other privacy intrusions

Although the main emphasis is on data protection, there is also provision for the regulation of other intrusions on privacy. The Privacy Commissioner is to be given the power to issue guidelines for the avoidance of acts and practices such as telemarketing or optical surveillance that might have an adverse effect on individual privacy, even where no record is involved.[24] The Commissioner will have the power to investigate and make recommendations to resolve disputes in relation to matters covered by guidelines but no right of proceedings in the Federal Court as is the case in respect of the data protection provisions.

The media is specifically acknowledged as a special case which warrants separate attention because of the considerable difficulties that are involved in attempting to strike an appropriate balance between freedom of expression and privacy.

How does it protect personal information?

The Information Privacy Principles

The existing IPPs in section 14 of the *Privacy Act 1988* are to form the basis of the statutory standard for data protection.[25] These principles were developed from draft principles outlined in the Australian Law Reform Commission's Report on Privacy[26] and have their origins in the principles contained in the OECD Guidelines, although they differ from these in some respects.[27] They are primarily concerned with ensuring the fairness and openness rather than

attempting to prevent the use of data for surveillance purposes. In other words they play a similar role to the rules of procedural fairness that have been developed in the context of judicial review which are not concerned with the substantive content of the decisions the subject of review although they are designed to provide an appropriate context for the making of substantively correct decisions.

Data collection

The first three principles are concerned with the collection of information.[28] Principle 1 prohibits the collection of information unless it is collected for a lawful purpose directly related to a function or activity of the collector and its collection is necessary for, or directly related to, that purpose. It also prohibits the collection of information by unlawful or unfair means. It should be noted that it does not impose any limitation on the purposes for which information may be collected provided that they are directly related to a function or activity of the collector, irrespective of any criterion of intrusiveness.[29]

Principle 2 imposes limitations on the solicitation of personal information from individual data subjects and, in particular, data collectors to take such steps (if any) as are reasonable to ensure that the individual is generally aware of the purpose for which the information is being collected, any law which requires or authorised its collection and who, if anyone, it is likely to be passed on to.

Principle 3, which deals with the solicitation of information generally, requires that the data collector should take all reasonable steps to ensure that, having regard to the purpose for which the information is collected, it is relevant, up to date and complete and does not intrude to an unreasonable extent upon the personal affairs of the individual concerned. Once again it should be noted that there are no constraints on the purposes for which information can be collected and no criterion for assessing reasonableness. In the case of the *Freedom of Information Act 1982* (Cth) the requirement of reasonableness in the context of the personal information exemption provision in section 41 has been interpreted by the Federal Court as requiring a balancing of the public interest in the disclosure of the information against the potential harm to personal privacy.[30] In the case of the private sector it is arguable that this may involve a weighing up of the private interest of the record keeper having regard to the extent to which the collection of that information is necessary for the carrying out of a lawful function or activity of the collector against the harm to the privacy of the individual concerned.

Security safeguards

The next provision, Principle 4 deals with the issue of security. Record keepers are required to ensure that that records are protected by such security safeguards as are reasonable in the circumstance, against loss, unauthorised access, use modification, disclosure or other misuse. The steps that are required may range from the placing of locks on doors and filing cabinets to the imposition of firewalls and other safeguards to prevent hacking and the encryption of data that is sent via the Internet. Record keepers are also required to take all possible steps to guard the security of records given to other persons in connection with the provision of a service to the record keeper. This would be of relevance, for example, where customer records were processed externally.

Access and amendment

There are also three further principles which provide rights of access and amendment which are designed to give individuals greater control over their personal information in the sense of being aware of what is held and being able to ensure that it is factually correct and up to

date. Principle 5 provides that a record keeper is required to take all reasonable steps to enable any person to ascertain whether he or she has possession or control of any records that contain personal information and, if so, the nature of that information, the main purposes for which it is used and the required steps for obtaining access. This is, however, subject to exception in cases where the record keeper is required or authorised to refuse to comply with such a request under the provisions of any Commonwealth law that provides for access to documents.

In addition to the duty to provide information in relation to specific requests, record keepers are required to maintain records that set out details of any personal record held including their nature, the purpose for which they are kept, the classes of individuals about whom they are kept, the period for the they are kept, the persons who are entitled to have access to them, including any conditions governing their entitlement to have access and necessary steps for obtaining access. These records must be available for inspection by members of the public and copies of them must be provided to the Privacy Commissioner in June each year.

Following on from this, Principle 6 provides for a specific right of access to personal records in the possession or control of a record keeper subject to the restrictions on access in other Commonwealth legislation.

Principle 7 contains closely related amendment rights and provides that a record keeper who has possession or control of a personal record is required to take all steps by way or of making appropriate corrections, deletions and additions as are reasonable in the circumstances to ensure that the information is accurate, relevant, up to date complete and not misleading. Once again this right is subject to any limitations arising under other Commonwealth laws. A record keeper who is not willing to amend a record must, if so requested, take all reasonable steps to attach to the record a notation setting out details of the requested amendments.

Restrictions on use

The safeguards in the access and amendment provisions are supplemented by a series of further principles which regulate the use of personal information by record keepers. Principles 8 and 9 require record keepers to check that personal information is relevant, accurate etc before using it and to confine its use to purposes to which the information is relevant. In a similar vein, Principle 10 imposes a number of further important limitations on the use personal information. For example, the record keeper who has obtained information for a particular purpose is preclude form using that information for any other purpose (other than one which is directly related) unless the individual concerned has consented to the other use, the record keeper has reasonable grounds for believing that use of the record for that other purpose is necessary to prevent or lessen a serous and imminent threat to the life or health of the individual concerned or of another person There are also exception in cases where use of the information for the other purpose is required or authorised by or under law, whether it is reasonably necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty, or for the protection of the public revenue. In the case of these further exceptions the record keeper is required to include in the record a note of that use.

Finally, Principle 11 imposes a number of important limitations on the disclosure of personal information to persons, bodies or agencies to whom the information subject could not reasonably have the information to be passed on. A record keeper is preluded from disclosing information to any such persons or bodies in the absence of consent by the

individual concerned except where the record keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person, where disclosure is required or authorised by or under law or whether the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue. (In the case disclosure which is made of the purposes of law enforcement/ protection of public revenue the record keeper is required to include a note in the record to that effect.) This principle also prohibits persons, bodies or agencies to whom information is disclosed under this principle from using or disclosing the information for a purpose other the purpose for which it was given to them.

Destruction of records

In addition to these existing principles, the Discussion Paper proposes the inclusion of an additional IPP which provides that records are not to be kept for longer than is required for the purposes for which the information may lawfully be used.[31] This reflects the principle that information which is collected for specific and limited purposes should not be retained indefinitely, particularly given the fact that its accuracy is likely to diminish over time.

Implementation

It should be noted that that the first three IPPs, which regulate the collection of data, are to apply only in respect of information that is collected after the commencement of the proposed legislation. The remainder, including the access and amendment provisions will apply to all information irrespective of when it was collected.

Codes of Practice

An important feature of the proposed scheme is the provision for the development of Codes of Practice which is intended to allow for the principles to be tailored to meet the needs of a particular part of the private sector. These Codes may be developed not only in respect specific industries, professions and callings but also in respect of specified organisations, specified activities and specified information and in relation to specific classes of all of these. They are intended to have the same binding effect as the IPPs which would apply in all cases where there was no Code in operation.[32]

The Codes of Practice are intended to serve two separate but complementary purposes. First they may prescribe how any one or more of the IPPs are to be applied or complied with by the record keepers who it regulates. This would serve to add clarity and specific content to the IPPs thereby avoiding unnecessary uncertainty. Secondly, they may be used to modify the application of any one or more of the IPPs by imposing standards that are either more or less stringent, subject to a prohibition against any limitation or restriction of rights of access and correction. Such modifications might exempt any action from an IPP either unconditionally or subject to conditions, impose controls on data matching, set guidelines for the imposition of charges in relation to access and amendment, prescribe procedures for dealing with complaints alleging breaches of the Code (other than ones which limit or restrict the Privacy Commissioner's powers to receive, investigate and endeavour to settle complaints) or provide for review of, or expiry of, the Code.[33]

Codes of Practice are to be issued by the Privacy Commissioner. However, while it is possible for her to issue them on her own initiative, it is envisaged that particular organisations, industries or could initiate and develop their own Codes and then apply to the Commissioner to have them issued.[34] The scheme provides for a number of procedures which are designed to ensure

that all interested parties are adequately consulted before any Code is issued and that they have an adequate opportunity to become familiar with its terms before it comes into effect. Codes cannot come into operation until at least 28 days after they are issued and are subject to disallowance by Parliament.[35]

There is also an alternative procedure for the urgent issuing, amendment or revocation of Codes which allows the Privacy Commissioner to dispense with the requirements for public notice and the taking of written submissions. However, any resultant Code, amendment or revocation would be regarded as temporary only and would remain in force for no longer than 1 year.[36]

Public Interest Determinations

The Privacy Commissioner is to continue to have the power make public interest determinations which authorise practices that might otherwise amount to a breach of either an IPP or a Code of Practice. This would provide an alternative to the development of Code which would be available in one-off cases that raise special factors.[37]

Access to and Correction of Personal Information

In addition to requiring compliance with the IPPs or with a Code of Conduct where this is applicable, the new scheme will provide for a scheme of access to, and amendment of, personal records which is analogous to that which is currently provided in relation to personal records in the possession of public bodies under the FOI legislation.[38]

Some of the key features of this scheme include a procedure for the making of requests for access and decisions in relation to those requests (including time limits), exemption provisions which set out the categories of documents that are exempt from access, rules which set out a schedule of charges for complying with requests, requirements to provide reasons for refusal and procedures concerning forms of access, access information not held in written form and provision of copies of documents from which exempt information has been deleted. Apart from the matters noted below these are in most respects similar to the requirements in the *Freedom of Information Act 1982*.

There is provision for fees to be charged for the provision of access and the making of amendments. These must be reasonable and linked to the reasonable cost of complying with a request. Very importantly, fees would not be able to be charged for the making of requests for the making and processing of requests including the work involved in deciding whether or not to grant a request, and if so, in what manner.[39]

The time limits imposed are 14 days for the notification of receipt of a request and 30 days for the notification of a decision. There is, however, provision for an extension of the 30 day time limit up to a maximum of 60 days in cases where a large quantity of the information is sought or needs to searched and it would unreasonably interfere with the operations of the business concerned to meet of the time limit or where the extent of consultation necessary makes it impossible to provide a proper response within the time limit.[40]

Insofar as the controversial question of exemption provisions is concerned, the Discussion Papers simply states that they would address a number of specific matters. These are the inability to locate information (ie, the situation where the information is not held by the recipient of a request, does not exist or cannot be found); the privacy interests, safety and physical or mental health of individuals; trade secrets and other in confidence information, evaluative or opinion material; legal professional privilege; contempt of court, the safe custody and rehabilitation of individuals and the

resource costs to the individual or organisation of complying with requests. These categories already exist in the context of requests for access to information under the *Freedom of Information Act 1982* (Cth) and state Freedom of Information Acts but their transposition to the context of private sector access rights will not be a simple exercise given the extensive use of the public interest criterion in the FOI legislation. While it may be possible to use a similar criterion in the case of private sector access rights, this will require a balancing of very different criteria (ie, the privacy interests which underlie the provision of access and amendment rights as against the interest in ensuring that businesses are able to conduct their businesses in an efficient manner).

Finally the recipient of a request for access would be required to be satisfied about the identity of the person making the request and to ensure that any information indeed for that person was received only by that person or his or her properly authorised agent.

Transborder Data Flows

In addition to being required to comply with the IPPs and/ or Codes, record keepers are subject to a number of restrictions concerning the transfer of data to non-Australian residents in countries with inadequate levels of privacy protection. These do not apply to transfers to Australian residents who are themselves subject to the IPPs governing storage and security, access and correction and use and disclosure.

Transfers to non residents in such countries without the consent of the data subjects would, in general, only be permissible where the record keeper has in place adequate contractual safeguards. However, a record keeper who transfers information out of Australia in reliance on contractual safeguards would be liable for any breach of the IPPs in relation to storage and security and use and disclosure of the information. There are also a number of limited exceptions to the general prohibition against data transfers in cases where the transfer of a record is in the interest of the data subject, in the public interest or required or authorised by law.

It is envisaged that those countries which have adequate laws would be specified by regulation. In order to qualify for inclusion a country would need to have in place a law which is substantially similar to, or serves the same purpose as, the (proposed) Australian privacy regime. Account would be taken of any reciprocal specification of Australian privacy laws.

Those countries which would be likely to qualify as having adequate privacy protection include the majority of EC member states, New Zealand, Hong Kong and Taiwan.[41] One glaring exception is the United States which continues to be implacably opposed to the concept of comprehensive private sector privacy laws. It should, however, be noted that in addition to the federal public sector Privacy Act there is also a patchwork of federal and state statutes which provides varying degrees of protection in respect of specific industries.[42]

Implementation

Finally, the proposed scheme provides for delayed implementation in order to give businesses adequate time to get their affairs in order and to allow for the development of Codes if these are required. Although all of the IPPs are to come into operation as soon as the proposed legislation is enacted, only IPPs 4-7 (the principles which relate to storage and security and access and correction) are to be enforceable immediately. In the case of the remainder there will be no right to bring proceedings in the Federal Court in relation to breaches, although the Commissioner is to have the power to receive complaints, to conduct investigations and to make

recommendations, including a recommendation to develop a Code.

Conclusion

The introduction of a comprehensive Australian privacy regime is required as a necessary response to the widespread use of surveillance technologies and the blurring of the boundaries between the public and private sector. It is important both in order to ensure adequate protection of human rights and to protect the economic interests of the Australian business community.

The proposed adoption of a co-regulatory scheme based on Information Privacy Principles and binding Codes of Practice follows the New Zealand model and therefore has the obvious advantage of using a system that has been successfully tried and tested and one in respect of which there is a growing body of useful information.[43]

While it is arguable that the IPPs have become outdated in the light of technological developments and that they are in urgent need of reform if they are to operate successfully in the context of the private sector, any attempt to reformulate them is likely to take a lengthy period and may therefor need to be postponed in order to avoid any undue delay in the implementation a private sector law. It is to be hoped that the government does not allow the reform process to become stalled for too long and that any legislation which emerges is not unduly emasculated as a result of the lobbying efforts of groups that are too short sighted to see that effective privacy regulation in the Australian private sector is not only inevitable but also in the interests of the vast majority of Australian businesses.

Endnotes

1 The relevant parts of the Coalition Government's Law and Justice Policy are extracted in (1996) 3 *Privacy Law & Policy Reporter* 4.

2 Cth of Aust, Attorney-General's Department; *Privacy Protection in the Private Sector*, September 1996.

3 At p 4.

4 See the Mastercard Report, 'Privacy and Payments: A Study of Attitudes of the Australian Public to Privacy - Summary and Findings' (1996) and the summary of its findings in Roger Clarke, 'Public attitudes to privacy - Mastercard's Australian survey' (1996) 3 *Privacy Law & Policy Reporter* 141.

5 The other major Australian study was commissioned by the Privacy Commissioner in 1990-1994; see HREOC, *Information Paper Number 3: Community Attitudes to Privacy* (August 1995).

6 See, for example, Louis Harris & Assocs and Alan F Westin, *The Equifax Report on Consumers in the Information Age* (1990); Ekos and Research Associates, *Privacy Revealed: The Canadian Privacy Survey* (1992).

7 The most obvious example is the difficulty involved in living down an adverse credit rating in a context where the rating itself makes it difficult to obtain credit and therefore the means for creating a more positive rating.

8 For a useful discussion of the use of the information highway to generate marketing profiles see US Department of Commerce, National Telecommunications and Information Administration, *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* (October 1995) Appendix A.

9 See, for example, the discussion of direct marketers' uses of mouse-click patterns and Internet trails in Andy Kessler. 'Tracking Mouse Droppings' *Forbes ASAP*, Aug 28, 1995 67 cited in US Department of Commerce, National Telecommunications and Information Administration, *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* (October 1995).

10 Collin J Bennett, *Regulating Privacy* (Ithaca, New York: Cornell University Press, 1992) 15-17.

11 Id 27-28.

12 Article 17 of the International Covenant on Civil and Political Rights to which Australia is a signatory, states that "no one shall be subjected to arbitrary interference with his privacy" and requires that individuals should have "the right to the protection of the law against such interference". In addition the OECD Guidelines require the adoption of eight principles of good data practice which form the basis for the IPPs in the Privacy Act 1988 (Cth) as discussed below.

13 US Department of Commerce, National Telecommunications and Information Administration, *Privacy and the NII:*

Safeguarding Telecommunications-Related Personal Information (October 1995) 28.

14 See clause 33 of Hong Kong Personal Data (Privacy) Ordinance which was enacted on 3 August 1995 and Article 24 of the Taiwanese Computer-Processed Personal Data Protection Law which took effect on 13 August 1995.

15 In a speech given at the Eighteenth International Conference on Privacy and Data Protection in Ottawa on September 18, 1996 the Canadian Minister of Justice, Allan Rock, stated that: "By the year 2000, we aim to have federal legislation on the books that will provide effective, enforceable protection of privacy rights in the private sector".

16 It should be noted that in the case of Quebec, the only Canadian province which has a privacy law that applies to the private sector, Article 17 of An Act Respecting the Protection of Personal Information in the Private Sector 1993 contains a limited restriction of the flow of information outside Quebec by requiring data-keepers to take all reasonable steps to ensure that the privacy of the data is protected. Furthermore the inclusion of tbf restrictions is the norm rather than the exception in the case of countries which have privacy legislation that extends to the private sector. The only notable exception is the New Zealand Privacy Act 1993.

17 See Graham Greenleaf 'The European Privacy Directive - Completed' (1995) 2 *Privacy Law & Policy Reporter* 81; Graham Greenleaf 'European privacy Directive and data exports' (1995) 2 *Privacy Law & Policy Reporter* 105.

18 External contractors are not subject to the requirements of the Privacy Act 1988 (Cth) although the Privacy Commissioner has published advisory guidelines, *Outsourcing and Privacy: Advice for Commonwealth Agencies Considering Contracting Out (Outsourcing) Information Technology and Other Functions (August 1994),* which contains recommended clauses for inclusion in outsourcing contracts. For a useful discussion of the accountability problems which are posed by the outsourcing of government services see Anne Marks, 'Outsourcing and Administrative Law in the Commonwealth Public Sector' in Kathryn Cole (ed), *Administrative Law and Public Administration: Form vs Substance* (AIAL, 1996).

19 On 19 February 1997, at The *New Privacy Laws: A symposium on preparing privacy laws for the 21st century*, in Sydney, the NSW Attorney-General stated that his government intends to enact a public sector Privacy Act and that this would be extended to encompass the NSW private sector in the event that the Commonwealth government fails to enact such laws within a reasonable time. Likewise, the Victorian Treasurer and Minister for Multimedia is considering a report prepared by the Data Protection Advisory Council.

20 The State public sectors are excluded for obvious constitutional reasons.

21 See p 7.

22 See p 6.

23 See p 5.

24 The following provide discussion of some of the current privacy issues that extend beyond data protection in the traditional sense Tim Dixon,, 'Workplace video surveillance - controls sought' (1995) 2 *Privacy Law & Policy Reporter* 141; Sheldon W Halpern, "The Traffic in Souls: Privacy Interests and the Intelligent Vehicle Highway Systems" (1995) 11(1) *Santa Clara Computer and High-Technology Law Journal* 45-73; NSW, Privacy Committee of New South Wales, *Electronic vehicle tracking* (Sydney : The Committee, 1990); NSW, Privacy Committee of New South Wales, *Drug testing in the workplace* (Sydney : The Committee, 1992).; NSW, Privacy Committee of New South Wales, *Electronic vehicle monitoring*(Sydney : The Committee, c1990); NSW, Privacy Committee of New South Wales, *Invisible eyes : report on video surveillance in the workplace* (Sydney : The Committee, 1995); Nigel Waters, Street Surveillance and privacy" (1996) 3 *Privacy Law & Policy Reporter* 48; Robin Whittle 'Calling number display: AUSTEL's PAC report' (1996) 3 *Privacy Law & Policy Reporter 8.*

25 See pp 6-12.

26 ALRC, *Privacy*, Report No 22 (Canberra: AGPS, 1983).

27 For a useful discussion of the origins of these principles and critique of them from the standpoint of technological change see John Gaudin 'The OECD Privacy Principles - can they survive technological change? Part 1' (1996) 3 *Privacy Law & Policy Reporter* 143.

28 Further guidance concerning the application of these principles to the public sector may be found in HREOC, Plain English Guidelines to Information Privacy Principles 1-3: Advice to Agencies about Collecting Personal Information (October 1994).

29 See, for example, Roger Clarke 'Flaws in the Glass; Gashes in the Fabric' paper presented to *The New Privacy Laws: A symposium on preparing privacy laws for the 21st century*, Sydney, 19 February 1997 3-4.

30 See *Colakovski v Australian Telecommunications Commissioner* (1991) 100 ALR 111.

31 See p 12.

32 It is expected that Codes will only be developed in a fairly limited range of contexts as has been the case in New Zealand where only three codes have been issued so far: the GCS Information Privacy Code which covers

a government-owned enterprise that supplies computer processing to number of government departments, the Superannuation Schemes Unique Identifier Code 1995 and the Health Information Privacy Code 1994. Further codes which are in the process of being drafted are a Telecommunications Code and a Police Code. In addition, the Credit Industry is still discussing the need for a separate code, with a final decision yet to be made.

33 See pp 13-14.

34 See p 12.

35 Codes are to be treated as disallowable instruments for the purposes of s 46A of the *Acts Interpretation Act* 1901 (Cth) and, if disallowed, would be treated as if they had never been made. Once issued a code could be amended or revoked by the Privacy Commissioner.

36 See pp 15-16.

37 See p 16. This procedure already exists in the *Privacy Act* 1988, Part VI. See also the Public Interest Determination Procedure Guidelines issued by the Privacy Commissioner.

38 See pp 16-21.

39 See p 17.

40 See p 18.

41 Those EC countries which do not have adequate laws at the moment are required by the Directive to have such laws in place by mid 1998. In addition, it should be noted that Quebec already has an across the board privacy regime and that Canada has committed to having such a law by the year 2000 (see fn 16).

42 For a useful overview see Henry H Perritt, Jr, *Law and the Information Superhighway* (New York: John Wiley & Sons, 1996).

43 See, for example, the useful advice contained in a paper titled 'The New Privacy Laws: Exemptions and Exceptions to Privacy Principles' which was presented at *The New Privacy Laws: A symposium on preparing privacy laws for the 21st century*, in Sydney on 19 February 1997 by Blair Stewart, the Manager of Codes and Legislation, Office of the Privacy Commissioner, New Zealand. See Elizabeth Longworth's article 'Developing industry codes of practice and policies for the Australian private sector' (1996) 3 *Privacy Law & Policy Reporter* 196.

A PRIVACY ACT FOR VICTORIA?

*Victor Perton MP**

Paper presented to AIAL seminar, Private sector privacy, Melbourne, 26 February 1997.

> *Privacy has already been penetrated in more subtle, complex ways. This assault on privacy, invisible to most, takes place in the broad daylight of everyday life. The weapons are cash registers and credit cards. When Big Brother arrives, don't be surprised if he looks like a grocery clerk, because privacy has been turning into a commodity courtesy of better and better information networks, for years.*[1]

Introduction

Thank you for the opportunity to speak at the Australian Institute of Administrative Law on the issue of privacy law. We live in a world in which the advantages and pitfalls of the anticipated Information Age are constantly being debated and assessed. An exemplary comment concerning this state of affairs is found in the US Government's latest draft of *The Framework for Global Electronic Commerce*:

> The Global Information Infrastructure (GII), now less than a decade old, is already transforming our world. Over the next decade, whole populations once separated by distance and time, will find almost every aspect of their daily lives their education, health care, work, and leisure activities - affected by advances on the GII.[2]

The convergence of telecommunications, information and mass media industries is transforming our industrial economy into an information economy.[3] This transformation will usher in a brave new world of technological opportunities and social change. We see it in factories with fitters and turners needing qualifications in computer programming. Unfortunately we also see it in redundancies, as middle managers lose their jobs to computer software taking over their analytical work.

The speed of this change is even more amazing when we consider that only a decade ago businesses with a fax number on their letterhead were thought to be technological wizards! While information is already regarded as the 'critical force' shaping the world's economic systems, it has been predicted that in the next century 'the speed with which information is created, its accessibility, and its myriad use will cause even more fundamental changes in each nation's economy'.[4]

In my own political life, the transformation in working styles as a result of the new technologies has been amazing. Collaboration on issues such as parliamentary protection of human rights and regulatory reform[5] involves colleagues in Paris, Ottawa and Washington DC. While face-to-face contact remains crucial, finding the faces of people interested in specialist fields is no longer restricted to finding those who have published journal articles or hold a chair with an appropriate title.

Many people in the Australian community (and indeed, the international community) understand that much work needs to be undertaken so as to ensure a future which protects our humanity while harnessing the economic and social

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advantages to be gained from the Information Age. It is clear that the changes introduced by the Information Age will impact upon the home, business, transport, education, medicine, economics, media etc. But crucially, and perhaps of most immediate significance to both the individual and the corporation, is the way in which the issues of data protection and privacy are addressed.

It is clear that new technological developments contain the potential to impact profoundly upon the privacy of individuals. They may produce a society, which is more intrusive and surveillance-oriented. Alongside this concern is the importance of finding the right balance between privacy and the free flow of information so as to provide confidence in the use of new technologies to ensure their commercial success. Without the establishment of this trust and confidence in the use of electronic services their potential use will remain just that a *potential* use. A key objective in the development of an effective privacy regime must be to provide the bedrock upon which electronic commerce and other innovative information technology projects may be built.

'Victoria 21 - into the Information Age: the Connected Community'

The Victorian Government is committed to the Information Age. Victoria's Minister for Multimedia, Alan Stockdale, was the first such minister in the world. The policy statement entitled 'Victoria 21 - into the Information Age: the Connected Community', explicitly promotes innovative and practical approaches to the adoption of new technologies. In addition it takes a pro-active stance to encourage the further development of an information industry and multimedia base in Victoria. The Victoria 21 policy underpins the Government's current activities and provides the long term planning framework for information technology development into the 21st century.

A range of projects have been, and are being, developed from the Victoria 21 policy including the Electronic Service Delivery project which aims to provide a single integrated electronic face of government using multiple delivery channels; the Wide Area Network (WAN) which aims to create a state-wide computer services network that will provide services to government initially but once established will also be used to provide services to regional and rural businesses, councils and the like; and a 'telemedicine' project using multimedia which is administered by the Department of Human Services.

However, in developing this infrastructure the Victorian Government has recognised that new technology creates new situations which existing law cannot control. While it has been argued that at times law creates 'a roadblock to progress' by its inability to adapt to these new situations, it is nevertheless indisputable that the law has an important role to play.[6] It will be the primary means by which the community can be reassured that its interests, for example in the area of privacy, are balanced against competing government or commercial interests. Privacy regimes must therefore form part of the infrastructure of our new information-based society.

Context

What I have to say today is informed and coloured by my experiences as a state parliamentarian with a commitment to protect human rights.[7] I have chaired an investigation into the cutting edge of data protection and privacy, and I have been required to justify my views concerning the most appropriate regulatory regime for Victoria.

My invitation to speak on the topic of 'Privacy in a Federation' must be put in the context of the appointment of the Data Protection Advisory Council (DPAC). This Victorian Government initiative assembled a council of experts to

appraise issues relating to privacy and data protection with a view to providing a recommended regulatory regime for Victoria.

Our terms of reference required us to report on the:

> most appropriate regulatory regime for Victoria governing collection, storage and transfer of information, particularly information held by public sector organisations and in so doing:
>
> 1 to have regard to the models, principles, and experience of data protection or privacy regulation schemes however called in other jurisdictions such as in other Australian States, in New Zealand and in the European Union; and
>
> 2 to consider the desirability of regulation covering the private sector, in light of the Commonwealth Government's activity in the area; and
>
> 3 make recommendations on the most appropriate regulatory regime for Data Protection and Privacy in Victoria.

The Council met from August to December 1996 and, as required, a report was presented to the Minister for Multimedia, on 20 December 1996. As Chairman of the DPAC I had a terrific opportunity to review and canvass local and international data protection and privacy issues. I had the opportunity to attend the Privacy and Data Protection Conference in Ottawa attended by almost all the privacy commissioners of the world. I talked through the issues with people as varied as the Cancer Council and the Victorian Police.

As it is a report to government, the Council's report will not be made public until Cabinet has approved an appropriate legislative response. However, it is no secret that we have made recommendations for a state based privacy statute to regulate the public sector. We have given advice that, as far as possible, the private sector regime should be achieved with maximum national uniformity.

Importantly for the purposes of this twilight seminar, we have recommended a redrafting of the privacy principles in plain English to take account of the developments of the decade since the Commonwealth Information Privacy Principles (IPPs) were drafted. I note that in her speech, Moira Patterson accepts the fact that the IPPs are outmoded but rejects redrafting as a lengthy process which will delay the implementation of a private sector law.[8] I point out to you that the form of the Australian IPPs is so daunting that the preservation of them will make general understanding of the principles of the law impossible to achieve.

Privacy: A hot topic at the end of the 20th century

While privacy is certainly a hot topic for citizens and states in this late part of the 20th century, it has been noted that over 100 years ago, in 1890, two learned American jurists published a respected report on 'the Right of Privacy'.[9] However, the issues of privacy and data protection have really become topical in the last couple of decades. A landmark was the issuing of the OECD Guidelines at the beginning of the 1980s, and in 1983, after an arduous inquiry, recommendations from the Australian Law Reform Commission formed the basis of the Commonwealth *Privacy Act 1988*.[10]

In May 1990, after another long inquiry, the Legal and Constitutional Committee of the Victorian Parliament tabled its report entitled 'A Report to Parliament Upon Privacy and Breach of Confidence'. The Report rejected the ALRC recommendations, and instead advocated the introduction of wide-ranging and comprehensive data protection legislation in Victoria.[11] In March 1992, the then Attorney-General, Jim Kennan, tabled a single page response to the Committee's recommendations in the Victorian Legislative Assembly and the Legislative Council.[12] Parliament was advised that the matters raised by the Legal and

Constitutional Committee were to be then referred to the Victorian Law Reform Commission ("the VLRC").[13] The VLRC were directed to report on the 'introduction of comprehensive information privacy/data protection legislation for Victoria and to provide a draft Bill in plain English to implement recommendations made by the Commission'. The Attorney-General reported that the VLRC had advised that it would submit its report early in 1992, which would then be considered by the Government with a view to the introduction of legislation as soon as possible.[14]

However, in a much delayed discussion paper released in October 1992, the VLRC commented that the 'simplest and most cost effective method of protecting the privacy of government-held information in Victoria is to amend the *Freedom of Information Act (Vic) 1982* ...'.[15]

The VLRC was abolished and replaced by the Victorian Parliamentary Law Reform Committee, which I chair, and the Attorney-General's Law Reform Advisory Council, chaired by the Chief Justice.

In 1997, clearly there is a pressing need to determine appropriate state and federal government policy.

Pressure comes from three separate levels:

1 **International**. The European Union (EU) Directive on transborder data flows (95/46/EC of 24 October 1995) demonstrates the seriousness with which the European Union views data protection and privacy issues. As of October 1998 EU Members will be prohibited from trading or dealing in personal information with outside countries that do not have 'adequate' data protection regimes in place.

2 **National**. The Commonwealth *Privacy Act 1988*, currently applies to the Commonwealth public sector (but also impacts upon the private sector through its credit reporting and tax file number provisions). An attempt will be made to extend it to the private sector. An announcement about such a proposed extension was made by the Commonwealth on 12 September 1996 in the discussion paper entitled 'Privacy Protection in the Private Sector'. Both publicly and privately, the Commonwealth Attorney-General, Daryl Williams, has demonstrated a desire to introduce new privacy legislation in 1997.

3 **State**. As stated earlier, the Victorian Government's Victoria 21 policy outlines a number of initiatives to support the development and use of new information technologies. 'Privacy' is integral to these developments. A privacy regime is seen to provide a bedrock for the development of electronic commerce, the Electronic Service Delivery project and other projects derived from the Victoria 21 policy.

State proposals

My impression is that the states and territories are at least as committed as the Commonwealth in their desire to introduce privacy legislation covering both the public and private sectors. The most recent announcement on this front was a late January 1997 commitment by the Queensland Government to introduce its own act this year which may cover the private sector and appears to have a regime which includes a privacy commissioner.[16]

In NSW, the Attorney-General's Department is preparing a Data Protection Bill, covering both the public and the private sectors, which may be introduced in the Autumn session commencing in March 1997.

In South Australia, the Commonwealth IPPs have been applied by administrative

instruction from cabinet applying from 1 July 1989.

In Tasmania, an October 1996 discussion paper, 'Information Privacy Principles', has been released for consultation.

In Western Australia, in the absence of privacy legislation, the Government's Information Policy Committee has convened a Working Party chaired by the Ministry of Justice to develop a best practice set of IPPs and Guidelines.

The private sector

As far as the submissions DPAC received from the private sector were concerned, data protection and privacy are key concerns and broad support was indicated for a uniform, national, comprehensive and penalty-based privacy regime (eg ICA, ABA, CRAA, ADMA). Much of the support for a privacy regime for the private sector was explicitly positioned within an international framework. Ansett Australia, for example, stated baldly that:

> If Australia is to be regarded as a leading member of the global community it must comply with international standards and it must introduce privacy legislation that complements that of its trading partners.[17]

In Australia these developments progress within a federal framework. Countries like Canada and Germany operate state and federal privacy regimes with a high level of co-operation. At times both sides find their federal/state counterparts a frustration, but the system seems to work.

In Australia too, the federal division of rights and responsibilities generally proceeds in a straightforward and uncontroversial manner. However, there are a number of occasions when the determination of responsibility is blurred or controversial.

Whilst interstate competition may generate benefits for the community (especially in the area of major events (joke)), it would be short-sighted for NSW or any other state to seek to use a state private sector privacy Act to claim some short-term competitive advantage. Even if the federal parliament delays federal legislation into 1998 or 1999, state governments are in a position to legislate swiftly. In that event, DPAC would advise the Victorian Government to legislate in time to ensure no adverse impact from the European Directive. On that point, however, while the European Directive is important, the United States shows no inclination to bow to the dictates of the EU and it is troublesome to attempt to predict the international enforcement of the directive.

On the topic of privacy, it is clear that constitutional issues arise within the context of Australia's federation. In its discussion paper, 'Privacy Protection in the Private Sector', the Commonwealth announced that it would rely upon a range of Commonwealth constitutional powers, to the extent of their power, in order to extend the *Privacy Act 1988* to the whole of the private sector.

The 'range of constitutional powers' will undoubtedly be examined in considerable detail before the new privacy regime is implemented. And, of course, it is clear that responsibility for the public sector within each state lies with the relevant state government. However, there is an important issue at stake here. Namely, the positive results to be obtained for all Australians by the Commonwealth and the states taking a co-operative approach to data protection and privacy.

The question to be addressed

The question to be addressed then is quite clear: What is the best way to develop a privacy regime for Australia? I want to argue strongly in favour of regulation concerning privacy - for it is where the discourses of human rights and economics impact upon each other to the advantage of both. It is clear that privacy is not just an optional extra with which to

decorate the information superhighway, but is an integral aspect of getting the Information Age to provide the sort of future we would want for our children.

While it may be easy to concentrate upon divisions and incompatibilities between the states and the Commonwealth, and between the states, surely the primary motivating force should be to foster privacy regimes throughout Australia which will provide secure, sophisticated and flexible privacy regimes with appropriate legislative backing. Victoria will certainly be proceeding with a privacy regime for the public sector which gives full support to the Government's Victoria 21 policy. The Victorian Government will also support the Commonwealth Government's intention to ensure that Australia is in a position to carve out a key position for itself in the global information technology market.

Conclusion: opportunities for the Information Age

The Information Age promises to change the world as we've experienced it so far, in what some academic commentators refer to as the post-modern condition.[18]

The Victorian Government strongly promotes a positive conception of the Information Age and its legal burdens. The most recent Annual Report of the Canadian Privacy Commissioner, Bruce Phillips, opens with a gloomy vision of the future being created through the indiscriminate implementation of new technologies. Mr Phillips speaks of the 'trail of data' citizens leave behind them, and describes 'modern urban life' as a place where 'there is nowhere to hide'.[19] He asks: 'In our search for security and convenience, are we hitching ourselves to an electronic leash?'

In contrast, the Victorian Government is committed to the development of a diverse and flourishing information economy. The Victorian Government prefers to think in terms of the benefits new technological applications may provide when pursued in tandem with a suitable legislative framework. Protection of privacy is one of the foundation stones of this economy.

Endnotes

1 Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier*, Reading, Mass., Addison Wesley, 1993.

2 The President's IITF, 'A Framework for Global Electronic Commerce', Draft#9, December 11, 1996, at p 1. No single force is held to embody this trend more than the 'evolving medium known as the Internet'. http://www.iitf.nist.gov/eleccomm/glo_comm.htm

3 A recent *Australian Financial Review* article notes Mr Harris Miller, President of the Information Technology Association of America, as saying that '... the global village is on the verge of becoming the international metropolis' (*Australian Financial Review*, 17/2/97).

4 'The Global Information Infrastructure: Agenda for Co-operation', at p 3. http://www.iitf.gov/documents/docs/gii/giiagend.html

5 Law Reform homepage at http://www.vicnet.net.au/~lawrefvc/

6 Juliet M Oberding and Terje Norderhaug, 'A Separate Jurisdiction for Cyberspace?' *Journal of Computer-Mediated Communication* Special Issue 'Emerging Law on the Electronic Frontier' 2/1 (1996) at p 2. http://jcmc.mscc.huji.ac.il/vol2/issue1/htm1#challenge

7 Perton, Victor, 'Parliamentary Protection of Rights', Lecture in Constitutional Law at Melbourne University (May 1996) http://www.vicnet.net.au/~victorp/rights1.htm

8 Patterson, Moira, 'Privacy Protection in the Private Sector: The Federal Government's Discussion Paper', paper delivered at the Australian Institute of Administrative Law Twilight Seminar on Private Sector Privacy, 26 February 1997. See AIAL Forum No 12.

9 Legal and Constitutional Committee, Fortieth Report to the Parliament, *A Report to Parliament Upon Privacy and Breach of Confidence*, May 1990, p vii.

10 Legal and Constitutional Committee, May 1990, p xii.

11 Legal and Constitutional Committee, May 1990, p vii.

12 Hansard, 17 March 1992, personal communication with Peter Spratt, Senior Research Officer, Victorian Parliamentary Library, 25/2/97.

13 Hansard, 17 March 1992.

14 Hansard, 17 March 1992.

15 Office of the Public Advocate and the Privacy Commissioner (1993), section 4.1.
16 'State Bid to Toughen Privacy Legislation', *The Australian*, 20 January 1997.
17 Ansett Australia, Submission to the Victorian Data Protection Advisory Council, 1996.
18 See, for example, Jean Francis Lyotard, the Postmodern Condition: A Report on Knowledge. Trans. Geoff Bennington and Brian Massumi, Minneapolis: Minnesota University Press, 1984. Thomas Docherty, ed. Postmodernism: A Reader. New York: Harvester Wheatsheaf, 1993.
19 Annual Report of the Canadian Privacy Commissioner 1996.

ADMINISTRATIVE LAW AND POTENTIAL LITIGATION: PROPOSED EXTENSION OF PRIVACY ACT TO THE PRIVATE SECTOR

*Mick Batskos**[1]

Paper presented to AIAL seminar, Private sector privacy. Melbourne, 26 February 1997.

Introduction

As the title of my paper suggests, I propose to deal with certain aspects of the proposed extension of the *Privacy Act 1988* ("Act") to the private sector which may give rise to the pursuit of remedies. These could include some form of administrative law remedy or traditional court proceedings to seek redress or compensation. Given my background as a litigator and administrative lawyer, I propose to focus on aspects of the regime proposed in the Attorney-General's discussion paper[2] relating to complaints, investigations and disputes. In particular, and assuming the proposals are enacted without change, I will outline:

(a) when an individual will be able to complain to the Privacy Commissioner;

(b) what will constitute an interference with privacy;

(c) how complaints will be made;

(d) when the Privacy Commissioner will be able to investigate the activities of an organisation;[3]

(e) how investigations are likely to be conducted;

(f) how complaints may be resolved;

(g) when organisations may be taken to court; and

(h) what types of remedies are going to be available for an interference with privacy.

Having done that, I propose to give some examples of the types of issues which may arise based on the New Zealand experience. These are likely to be instructive given that it is likely that amendments of our Act will probably mirror the New Zealand model quite closely.

Before continuing, I would, however, like to point out that I do not advocate too legalistic an approach to dealings with the Privacy Commissioner. It is important to bear in mind the comments of the Attorney-General in relation to complaints at the launch of the discussion paper that any investigation and complaint resolution mechanisms will need to be flexible and informal.[4] I also think the New Zealand Privacy Commissioner made a valid point when he stated at a recent New Zealand Law Conference:

> The involvement of lawyers is often beneficial. However it is also true that the involvement of lawyers can often be positively harmful or destructive to the process. Sometimes it is quite clear that a lawyer's involvement is doing a client a disservice by making a complaint which ought to be able to be informally resolved, protracted, irreconcilable and ultimately expensive to complete. Some

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> lawyers for agencies start with the perception that I am the complainant's advocate, and must therefore be confronted; others that I am engaged in an adjudicative and decision-making function and so can be threatened with the rules of natural justice and judicial review. [T]he process is in fact informal, inquisitorial and in private.[5]

Given the emphasis on alternative dispute resolution in traditional litigation in recent times, I do not believe lawyers will generally have much difficulty "adjusting their work habits to the alternative dispute resolution procedures and disengaging themselves from unwanted legal 'baggage'" as the New Zealand Privacy Commissioner suggested would be required from lawyers who will be most successful in the privacy environment.[6]

Complaints

The discussion paper proposes that an individual would be able to make a complaint to the Privacy Commissioner about an act or practice of an organisation that:

(a) might be an interference with privacy; or

(b) might otherwise adversely affect the privacy of an individual and is inconsistent with guidelines issued by the Privacy Commissioner (eg as is proposed in the telemarketing and optical surveillance areas).

This paper focuses on interferences with privacy.

There are three types of acts or practices of organisations which it is expected will give rise to an "interference with privacy". First, where one or more of the Information Privacy Principles ("IPPs") or a Code of Practice is breached in relation to the personal information of the individual concerned. Secondly, where the organisation concerned makes a decision about fees. Such a decision may relate to the amount charged for making available information under IPP 5,[7] for providing access under IPP 6 to personal information in response to a request for access, or for altering a record containing personal information pursuant to a request under IPP 7[8]. Thirdly, where the organisation makes a decision about extending the 30 day time limit within which to make a decision about access by not more than a further 30 days. The last category will only be an interference with privacy if, in addition, the Privacy Commissioner believes that there was no proper basis for the decision to extend the time limits. At present a time limit can be extended if:

(a) the request was for a large quantity of information or necessitated a search through a large quantity of information and meeting the time limit would unreasonably interfere with the operations of the organisation; or

(b) consultation necessary to make a decision on the request meant that a proper response could not reasonably be made within the time limit.

The right to access to documents under IPP 6 will be subject to various exemptions which recognise interests which may conflict with an individual's right to access. The discussion paper vaguely refers to exemptions which would address the following matters:

(a) the information requested did not exist or could not be found;

(b) the information requested was not held by the organisation to whom the request was made;

(c) the safety of any individual;

(d) trade secrets and other commercial in confidence information;

(e) the privacy interests of others individuals;

(f) evaluative or opinion material;

(g) the physical or mental health of individuals;

(h) the safe custody or rehabilitation of individuals.

It is unclear precisely how the exemptions will be worded, but I expect them to mirror closely the exemptions in the *Freedom of Information Act 1982* ("FOI Act"). If so, and given the vast amount of case law that has developed in interpreting the exemptions in the FOI Act, I expect disputes to arise about the applicability of exemptions. If access is refused because a particular exemption is claimed, the failure to provide access will be a possible breach of IPP6 and might constitute an invasion of privacy. Accordingly, a disgruntled applicant could complain to the Privacy Commissioner.[9]

I have tried to identify the types of issues which may be relevant to some of the proposed exemptions (see Table).

An organisation will be required to give reasons for any decision to refuse access to or correction of personal information. It will be interesting to see how detailed that statement of reasons must be and whether it must be given in writing. It seems that if provisions similar to those which exist in the FOI Act are introduced in relation to giving reasons for refusal, the private sector will experience the same confusion and uncertainty as to what that statement should include as FOI officers were (and still are) having under the FOI Act.

Exemption proposed	Possible issue
The information requested did not exist or could not be found	Who will review the adequacy of the search, will it be the Privacy Commissioner? Will the Privacy Commissioner have power to order further inquiries?
The information requested was not held by the organisation to whom the request was made	Will there be an obligation on the organisation to refer the matter to another organisation if it knows that the other organisation has the requested information or is more likely to have it?
The safety of any individual	Presumably that would included the safety of the applicant seeking access.
Trade secrets and other commercial in confidence information	Would this relate only to the organisation who is the record-keeper, or would it include other organisations' information as well? Will there be a requirement to consult with affected third parties as is suggested by the "time extension" proposal?
The privacy interests of others individuals	Will access be given if the personal information is about the applicant and another person?
Evaluative or opinion material	Will this exclude purely factual information?
The physical or mental health of individuals	Presumably there will be a provision for the production of the information to which access has been sought to a nominated medical or other suitable practitioner?

Another interesting feature is that there will be provision for representative complaints. This is could lead to a "class" type of complaint made by an individual on behalf of a group or class of individuals. The current provisions of the Act define representative complaints as meaning:

> a complaint where the persons on whose behalf the complaint was made include persons other than the complainant, but does not include a complaint that the Commissioner has determined should no longer be continued as a representative complaint.

Under the current provisions in the Act a representative complaint may be made if:

(a) the class members have complaints against the same person; and

(b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and

(c) all the complaints give rise to a substantial common issue of law or fact.

A representative complaint must:

(a) describe or otherwise identify the class members' and

(b) specify the nature of the complaints made on behalf of the class members; and

(c) specify the nature of the relief sought; and

(d) specify the question or law or fact that are common to the complaints of the class members.

In describing or otherwise identifying the class members, it is not necessary to name them or specify how many there are. A representative complaint may be lodged without the consent of class members.

It will be interesting to see if collective bodies, such as unions, will attempt to bring representative complaints through a member who may be affected by a particular problem. It will also be interesting to see how broadly the Privacy Commissioner will interpret the representative proceeding provisions.

A complaint must be in writing. The staff in the office of the Privacy Commissioner will provide assistance to a person wishing to make a complaint.

Investigations: when are they to be conducted?

Subject to some exceptions, the discussion paper suggests that the Privacy Commissioner would be required to investigate acts or practices which could give rise to an interference with privacy[10] in two instances:

(a) a complaint must be received AND the Privacy Commissioner considered it desirable to investigate; or

(b) upon the Privacy Commissioner's own motion AND if he or she considered it desirable.

This differs significantly from the current provisions in the Act which state that the Privacy Commissioner shall investigate an act or practice if the act or practice may be an interference with the privacy of an individual and a complaint about the act or practice has been made. There is no additional requirement to determine whether it is considered desirable to investigate. It must be investigated if there is complaint.

In addition, the Privacy Commissioner may also investigate an act or practice which may be an interference with privacy (ie has a discretion to choose to do so) if it is thought desirable to do so. Under the current provisions, the need to determine whether or not an investigation is desirable only arises where the Privacy Commissioner considers that an act or

practice may be an interference with privacy - not where a complaint has been received.[11] Under the proposed extension to the private sector, an investigation of a complaint need not be investigated at all if the Privacy Commissioner does not consider it desirable.

In addition to considering when the Privacy Commissioner must or may investigate it is important to note that the Privacy Commissioner would be able to decide not to investigate or further investigate an act or practice if satisfied that:

(a) there was no interference with privacy;[12]

(b) no person aggrieved by the act or practice sought the investigation;

(c) the complainant had not first complained to the organisation about the act or practice;

(d) the organisation dealt or was dealing adequately with the complaint or had not had an opportunity to do so;

(e) the complaint was made more that 12 months after the matter came to the complainant's attention;

(f) the complaint was frivolous, vexatious, misconceived or lacking in substance;

(g) the complaint was being dealt with under another Commonwealth Act;

(h) another remedy had been or was being sought which had disposed or was adequately disposing of the complaint;

(i) if the complaint related to a Code of Practice which set out a complaints procedure, that procedure was not fully pursued where it would have been reasonable to do so;

(j) another more appropriate remedy was reasonably available.

Again, these provisions are similar to existing provisions in the Act.[13] What they suggest is that it is in the interests of organisations wishing to maximise their chances of avoiding investigations by the Privacy Commissioner to introduce appropriate internal procedures for handling complaints about privacy. These procedures should be well documented and actually applied in practice; they should not just be a token gesture.

The provisions relating to the ability for the Privacy Commissioner to refuse to investigate raise some interesting administrative law issues and questions which I do not propose to answer in this paper:

- is the decision of the Privacy Commissioner to refuse to investigate subject to judicial review under:

  (a) the *Administrative Decisions (Judicial Review) Act 1977*,

  (b) section 39B of the *Judiciary Act 1903*?

- would the complainant be able to get reasons for such a decision to refuse to investigate?

- would the conduct of the Privacy Commissioner in refusing to investigate be able to be investigated by the Ombudsman?

- what remedies would be available to the complainant given that a proceeding may not be able to be brought in the Federal Court for an order seeking compensation where the Privacy Commissioner has not investigated (see below).

The discussion paper states that the investigation procedures are intended to be flexible and informal.[14] Although informality and flexibility may arise in

practice, this is not necessarily reflected in the types of powers the Privacy Commissioner will have even though the investigation procedures proposed are very similar to those which currently exist in the Act.[15] Given that private sector organisations have not been exposed to the culture of openness which administrative law type remedies have encouraged in the public sector, I suspect that the Privacy Commissioner may have to rely on some of the more serious powers available when dealing with private sector organisations and trying to investigate complaints.

Before an investigation is commenced, the Privacy Commissioner will be required to inform the organisation concerned of the investigation. Investigations would be conducted in private as the Privacy Commissioner thinks fit. The Privacy Commissioner will be able to obtain such information and make such inquiries as thought fit. Ordinarily, that would be by informal and personal inquiry and by discussions or correspondence with relevant persons.

However, there would also be substantial powers of compulsion including the power to:

- give persons notice to provide relevant information, answer questions or produce relevant documents;
- require persons to attend in order to provide information or answer questions on oath;
- direct persons to attend a compulsory conference (to try and settle a complaint) where a failure to attend without reasonable excuse would be an offence;
- conduct compulsory conferences in private to try and settle complaints. Neither the complainant nor the organisation would be able to be legally represented. However, an organisation can be represented by an employee, member or officer. This gives organisations a potential advantage where they have in-house lawyers who can attend on its behalf;
- transfer complaints to the Human Rights and Equal Opportunity Commission where it would be more appropriate to do so.

Settlement, court proceedings and civil penalties

If the Privacy Commissioner considers that a complaint is substantiated, she would be required to use her best endeavours to secure a settlement between the parties. The Attorney-General envisages that as part of this process the Privacy Commissioner would make constructive suggestions with a view to resolving complaints.[16] The settlement process might include obtaining assurances against the repetition of the act or practice which was investigated (or a similar act or practice).

The Privacy Commissioner would be able to issue an assessment of the organisation's compliance with the IPPs (or the relevant Code of Practice) and issue an assessment of any appropriate remedy, including compensation. The current provisions in the Act include a power for the Privacy Commissioner to make a declaration that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint. The loss or damage referred to includes injury to the complainant's feelings or humiliation suffered by the complainant.

In what appears to be an attempt to avoid the consequences of the High Court decision in the Brandy case, the Act was amended to provide that a determination of the Commissioner is not binding or conclusive between any of the parties to the determination.[17] This raises the interesting question of enforcement of

any determination of the Privacy Commissioner on a complaint. At present, where a determination is made against an agency that it pay compensation, if the agency has the capacity to sue and be sued, the amount is recoverable as a debt due by the agency to the complainant. In any other case, the amount is recoverable as a debt due by the Commonwealth to the complainant.[18] I suspect, however, that the provisions in the Act which apply to eligible case managers (as defined in the *Employment Services Act 1994*), ie private sector contractors, are most likely to be the ones to apply when the Act is extended to the private sector. In cases involving an order for compensation against eligible case managers, the Commissioner or the complainant may commence proceedings in the Federal Court for an order to enforce a determination. If the Court is satisfied that the respondent has engaged in conduct that constitutes an interference with the privacy of the complainant , the Court may make such orders (including a declaration of right) as it thinks fit.[19]

In the Court proceedings to enforce a determination of the Privacy Commissioner, the question whether the respondent has engaged in conduct that constitutes an interference with the privacy of the complainant is to be dealt with by the Court by way of a hearing de novo, but the Court may receive as evidence any of the following:

(a) a copy of the Commissioner's written reasons for the determination;

(b) a copy of any document that was before the Commissioner ;

(c) a copy of a record (including any tape recording) of any appearance before the Commissioner (including any oral submissions made).

Where the Privacy Commissioner does not make a determination (eg ordering payment of compensation), a complainant alleging an interference with privacy would also be able to commence Federal Court proceedings to consider the whole matter afresh. This would not be by way of a review of any assessment of the Privacy Commissioner, nor would such proceedings be able to be commenced to enforce any settlement agreement. Federal Court proceedings will be able to be commenced in three circumstances. They are where the Privacy Commissioner:

(a) was unable to secure a settlement; or

(b) considers that the matter was not suitable for settlement; or

(c) considers that the matter raised public interest concerns.

The Federal Court would be able to order organisations to pay compensation, refrain from acts or practices which would constitute an interference with privacy and to do acts necessary to avoid an interference with privacy. The Privacy Commissioner can make determinations along the same lines but they are not enforceable and not binding.

In addition, the Privacy Commissioner would have the power to seek an order for civil penalties from the Federal Court for:

(a) unauthorised disclosure of personal information for profit; and

(b) obtaining a person's personal information by false pretences.

In hearing these types of cases the Federal Court would apply the rules of evidence and procedures which usually apply to civil matters.

By contrast, where a matter would involve an adverse effect on the privacy of an individual (eg. in telemarketing and optical surveillance areas), the Privacy Commissioner would only have power to make recommendations as to consistency with guidelines and as to an appropriate

remedy. No Federal Court proceedings could be commenced.

The discussion paper is silent on whether or not injunctions will be available to stop an interference with privacy. There is no equivalent proposed (it would seem) to subsection 55(3) or section 98 of the Act. The former provision enables an interim injunction to be sought pending determination of the proceeding to enforce a determination of the Privacy Commissioner. The latter provision enables an injunction to be sought where a person has engaged, is engaging or is proposing to engage in any conduct that constituted or would constitute a contravention of the Act. It can be sought by the Privacy Commissioner or any person. The applicant need not have any special interest to have standing. Accordingly, interest groups are able to seek injunctions without the need to establish an interest greater than any member of the public. Further, where an injunction is sought, no undertaking as to damages need be given: subsections 55(4) and 98(7).

As representative complaints will be possible, I presume that the provisions of the Act will be extended in relation to identification of the class to be affected by any determination about a representative complaint, and the manner in which members of the class may participate in or benefit from any such determination.

One additional area which is not addressed by the discussion paper is whether the provisions in the Act relating to obligations of confidence and the remedies which are available for them will be extended to apply to the private sector. If so, there is judicial support to suggest that IPP 11 may give rise to a continuing obligation of confidence and that an injunction may be obtained to stop an anticipated breach or an action for damages may arise if that obligation is breached.[20]

The New Zealand experience

The discussion paper states that individuals or organisations would be liable for the acts of employees done in the course of their employment and agents within their actual and apparent authority unless the individual or organisation had taken all reasonable precautions and exercised due diligence to prevent the act. As long as employers can point to procedures in place, workplace guidelines and other reasonable precautions to protect the privacy of personal information, this will satisfy their duty under the Act. In such a case, the employee or agent is alone responsible. This is illustrated in a number of decisions of the New Zealand Privacy Commissioner. References to IPPs are to those contained in the New Zealand Privacy Act.

Case Note 1911 of 1994

In Case Note 1911 of July 1994, the complainant called the telephone company and the customer services representative used the calling identification system to identify the complainant by name. She informed the complainant that she had a screen of personal information about the complainant. The complainant was unhappy that his personal information could be disclosed by the company.

The Privacy Commissioner made informal enquiries about the company's system. He ascertained that the caller identification system is not made available to customers. To ensure that customer information is not improperly disclosed, the company had implemented strict guidelines including checking the caller's identification before volunteering information. This is done by questioning the caller and comparing it with information on computer. Information about the subscriber should only be disclosed to the subscriber, not other individuals, even if they called from the subscriber's line.

Therefore the employee had not followed the company rules and had acted outside her course of employment. A reminder was sent to all staff reminding them of the correct procedure and apologies were conveyed to the complainant. The complainant was satisfied and the investigation discontinued.

Case Note 5251 of October 1995

This concerned a bank disclosure of personal information to the complainant's husband of the balances of the complainant's personal accounts. This infringed IPP 11 and led to an argument between the couple which resulted in her husband assaulting her. The Bank offered $500 compensation which the complainant accepted. The Bank did have adequate procedures in place to prevent this type of disclosure. The disclosure here was inadvertent and the employee was spoken to about the matter.

Case note 1484 of April 1994

This case illustrates the need to have thorough procedures in place to ensure compliance. In this case, the complainant requested a copy of her personnel file when she finished employment. When she received no response, the Privacy Commissioner investigated this as a possible breach of IPP 6, the Access Provision. The Department promptly delivered the file on receiving notice of the complaint from the Privacy Commissioner. However, the file did not contain all of the information about the complainant. She wrote again requesting the full file. It was explained that the reason for the incompleteness of the file was because the original request had not been sent to all of the areas in which she had previously worked. Once the complainant received the whole file, she was satisfied with the outcome and the investigation was discontinued.

Case note 2594 of November 1994

This illustrates the need for record keepers to take reasonable precautions to protect personal information from unauthorised disclosure. The complainant felt that the unauthorised disclosure by management staff to non-management staff that she was leaving her job infringed IPP 5. The Privacy Commissioner decided that an overheard conversation between managers was due to a failure to take reasonable precautions to protect the personal information from unauthorised use. The respondent had since installed a private office for supervisors. However, the information was of a nature that other members were entitled to know (as the fact of a staff member leaving may impact on others' work loads) and therefore stringent security safeguards were not required.

Case note 1213 of October 1994

The General Manager of a car dealership wrote to the complainant as the owner of a BMW, offering assistance if the complainant which to purchase a new car. The car dealer had access to the name through his past employment and had used that information for direct marketing purposes in respect of another company. This had not been authorised by the complainant and therefore infringed one of the IPPs.

Endnotes

1 Any views expressed in this paper are mine and not those of Mallesons Stephen Jaques. This paper is not and should not be taken to be legal advice. I would like to acknowledge the assistance of Tresna Tunbridge, a summer clerk employed by Mallesons Stephen Jaques, in collecting various research materials which were integral to the preparation of my paper.

2 Attorney-General's Department, Discussion Paper, "Privacy Protection in the Private Sector", September 1996, ("**discussion paper**")

3 For "organisation" read "organisation or individual" The discussion paper proposes

that the *Privacy Act* extensions will apply to organisations and individuals, however, in this paper I refer to organisations only for ease of reference and in the interests of brevity.

4 See text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 51

5 Bruce Slane, NZ Privacy Commissioner, "Principles in Practice: Privacy Act Challenges for Lawyers", Dunedin, 9-13 April 1996 extracted from his internet site: http://www.kete.co.nz/privacy/welcome.htm.

6 Ibid.

7 IPP 5 requires a record-keeper to maintain a record setting out the nature of the records of personal information kept, the purpose for each record, the class of individuals about whom records are kept, the period for which each type of record is kept, who can have access and how access can be obtained.

8 IPP 7 requires a record-keeper to make corrections, alterations, deletions or additions to ensure personal information is accurate, relevant to its purpose, up to date, complete and not misleading.

9 Discussion paper, p20.

10 An investigation would also be required where the act or practice could otherwise affect the privacy of an individual because it was inconsistent with one of the Privacy Commissioner's guidelines.

11 See section 40 of the *Privacy Act 1988.*

12 No investigation is also required if the Privacy Commissioner considers privacy was not adversely affected.

13 See section 41 of the *Privacy Act 1988.*

14 See also text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 51.

15 See Sections 43-48 *Privacy Act 1988.*

16 See text of address by Attorney-General to Insurance Council of Australia, 12 September 1996, para 53.

17 Compare *Personal Data (Privacy) Ordinance* 1995 of Hong Kong which confers on the Privacy Commissioner under that legislation comprehensive mandatory powers to enforce compliance with determinations.

18 See Section 60(2) *Privacy Act 1988.*

19 See Section 55 *Privacy Act 1988.*

20 *Austen v Civil Aviation Authority*, unreported, Full Federal Court, Wilcox, Foster & Carr JJ, 20 May 1994.

INFORMAL POLICY AND ADMINISTRATIVE LAW

*David Clark**

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Introduction

Intellectual distinctions have a habit of at first liberating and then imprisoning the mind. This is nowhere better illustrated than in the case of the courts' attitudes towards informal policy in administrative decision-making. The courts once thought that policy was none of their business.[1] In the early seventeenth century the argument was that royal policy was not a matter for judicial review because these were matters of state into which the courts could not inquire.[2] Later, after the establishment of constitutional government, and in recognition of the different roles of the courts and the executive branch of government, a new basis emerged for the difference between law and policy in which a sharp distinction was drawn between the two. Policy was said to be the responsibility of politicians and possibly bureaucrats, and was to be examined through the political process. It followed from this that policy could not be judicially reviewed[3] and the courts from time to time announced that policy was not their concern. This attitude manifested itself in the early cases on statutory interpretation when a decision was made not to consider the views of administrators as to what the legislation meant.[4]

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Another rationale for distinguishing between law and administrative policy developed by the courts drew a distinction between administrative policies, that is, those made by civil servants, and political policies, that is, those made by politicians. The former were reviewable but the latter were not.[5] The rationale for this distinction was twofold. First, political policies made by politicians were usually laid before the legislature and were often the subject of legislative scrutiny, while policies made by administrators were usually not examined in this manner. Secondly, this distinction help preserve, however tenuously, the division of labour between the political section of the executive and the administrative section and it was generally thought that review of the former was likely to raise the ire of politicians and was best left alone. Later it was realised that this distinction was unsatisfactory for administrators also made and implemented policies, not all of which were in legal form. This commonly occurred when statutory grants of power were broad or vague and it became necessary for the administrative agency to fill in the details. One way of doing this was by using powers to make subordinate or delegated legislation which was supposed to be flexible.[6] In modern times this has not proved to be the case because of the need to consult affected groups before regulations are introduced. These political/ administrative arrangements slowed the process of regulation making and led to the expansion of informal policy. It also came to be understood that political policies including those emanating from cabinet were not necessarily immune from review especially where they conflicted with governing legislation.[7] Thus while in principle no informal policy is now immune from review there is still a marked reluctance to intervene where it is

assumed that the law embodies a discretion, where the policy content is great[8], and where the policies relate to subject matter towards which the judiciary thinks greater deference to the executive is warranted.[9] If the policy is embodied in a statute the wisdom of the policy cannot be challenged though the judiciary might review it if it conflicted with the constitution.[10]

Although it had been appreciated in the middle of the nineteenth century[11] that administrative agencies often formulated policies to guide their decisions, it was only in the last two decades that a significant body of legal rules began to emerge in which the courts came to grips with the relationship between informal policies and the law. The interface between law and policy, said to be a difficult one,[12] is now of great practical importance and these recent developments are central to any understanding of how administrative law works in practice. While it may be tempting for public servants to assume that the law is best left to lawyers, in practice, legal powers are conferred upon non-lawyer public officials. In short the greatest repository of legal authority in the administrative system is in the hands of non-lawyers.[13]

This paper will consider the developing relationship between informal policy and administrative law. It will be argued here that the courts have abandoned a simple disjunction between the two spheres and have become increasingly sophisticated in their examination of this relationship. In so doing they have come to appreciate the ways in which policy is used by decision-makers and the way policy may impinge upon the exercise of legal authority. One of the questions to be considered in this paper is whether the simple distinction between law and policy is intellectually defensible. It will be argued here that there are not two mutually separate spheres one called law and the other policy, but that the two categories are necessarily interrelated.

The definition and status of informal policy

In this paper informal policy refers to any set of guidelines, whether published or not, whether written down or not, that regulates or guides a series of decisions authorised by law.[14] Policies normally set objectives and also include considerations designed to achieve the objectives of the policy. Informal policy is to be distinguished from formal policy in that the latter is in a legal, normally a legislative form. Informal policy in contrast is not legislation, and may take many forms. Informal policy in this sense may be published in the form of a leaflet or booklet[15] or even in a *Government Gazette*.[16] It might take the form of guidelines[17] or notes for general guidance[18] or merely be a departmental practice.[19] Some departments have a policy manual[20]; others publish a news release,[21] issue codes, practice notes,[22] letters, [23] general orders[24], and warnings. In other cases the policies may be generally known to those in the industry. Policies may be announced or be long standing.[25] In many cases the policy may not even be written down for internal use, but amount to a practice or a rule of thumb.[26] These are the least visible policies, but may in practice be the most important. Some policies are developed by the agency[27] often in consultation with a regulated industry[28], others are imposed from above by the government, while yet others emerge from the bureaucracy but are approved at the political level.

It follows that informal policy refers to guidelines not in strict legal form and is to be contrasted with policies in legal form, ie a statutory policy[29] and with policies made by the courts.[30] Unfortunately the answer to the question whether a policy is formal or informal is not obvious and the courts have said that some self-styled policies are not merely policies, ie are non-binding, but give rise to legal expectations. In this case a new distinction is suggested between policies that have legal consequences and those

that do not.[31] The general rule is that informal policy is not law nor can it be regarded as law.[32] Such policies cannot, for example, lay down mandatory or determinative[33] requirements for this would be tantamount to the making of de facto laws which, aside from the lack of authority to so make, would evade the public debate, legislative scrutiny and other safeguards associated with normal law making.[34] It follows that informal policy, in the event of a clash with law, must conform to or be subordinate to the law.[35] The difficulty[36] is that there is no legal definition of informal policy and even the terms used by agencies themselves are not decisive[37], for what matters is the function and use to which a policy, however named, is put, rather than the nomenclature chosen. Thus directions, for example, sometimes mean binding instructions and in other contexts no more than guidelines that must be taken into account but which may be departed from if appropriate. [38]

In practice, policy and specific decisions may be closely inter-related: a policy may grow out of a specific decision and a specific decision may be one of a sequence of similar decisions that implement policy. In other words, at some point, the two concepts merge and become indistinguishable.[39] In orthodox legal theory a policy is assumed to be highly flexible and easily changed, while the law is assumed to be relatively fixed and certain.[40] In practice this distinction is dubious for some policies are so deeply entrenched that they are virtually impossible to change, while some legal rules change almost overnight.

The courts also assume that policies are relatively abstract and general while legal rules and decisions are precise.[41] In fact, some policies are highly specific and may amount to a rule.[42] What matters here is not the terminology, for a policy may be called a rule[43], but the role of the policy. The level of abstraction may not be very high in practice for policy-making is not confined to the upper reaches of government[44], and may occur in relatively humble agencies such as a rent control tribunal[45] or a gun licensing agency.[46]The other major characteristic of policy as used in legal analysis is that it, like discretion, refers to matters of value rather than to matters of fact or law.[47]

Role of policy

Administrative policies are developed in response to problems faced by administrators especially where the agency is engaged in high volume decision-making.[48]

(1) The statutory mandate may be so vague that the administrators are genuinely perplexed as to what they must do. They may choose to issue more detailed internal guidelines to operationalize or make more concrete legal standards.[49] This may lead to legal problems where the effect of the internal guidance is to narrow the scope of discretion conferred upon the decision-maker by law. In one British Columbian case[50], the Superintendent of Motor Vehicles was permitted by law to issue drivers' licences to persons who were "fit and proper". The Superintendent chose to operationalize this standard by adopting strict eyesight test guidelines. The test measured binocular vision on the assumption that a person lacking binocular vision could not judge distances and therefore could not be a "fit and proper" person to hold a driver's licence. The applicant in the case, who had held a licence in another Canadian province for twenty years, was found to have monocular vision. This was a condition that he had had since birth and he presented compelling medical evidence that he had learned to correct for this and could in fact judge distances. The department decided that anyone who failed their binocular test could not hold a licence. The court decided that the Superintendent had mistakenly confused his guidelines with the relevant test. It was possible, though a very rare event, for an applicant to fail the departmental test but

still comply with the statutory criterion. Two lessons may be drawn from this case. First, no agency should assume that they have seen it all. In other words departments have to resist the easy or lazy assumption that past practice is always an accurate guide to the future. Second, any agency that wishes to make highly specific standards must make sure that these standards are co-extensive with the law or be prepared to consider cases that fall outside the policy but within the bounds of the relevant statute.

Of course the statute may in fact prescribe the variables to be taken into account in precise terms in which case there will be less need for a policy to elaborate on vague matters. In such a case there is a greater danger that the policy will induce the agency to ignore the statutory criteria and thereby fail to do its duty. [51]

(2) A common function of policy is that it is a way of programming decisions that are believed, sometimes mistakenly as we saw above, to be routine. This may promote efficiency in areas where the policy environment is relatively stable and the problems of a largely predictable nature. It would be expecting too much of an agency to begin every decision-making exercise afresh.[52] In another case from British Columbia,[53] the Superintendent of Motor Vehicles had a statutory discretion to cancel a driver's licence if the holder had been convicted of certain offences. Cancellation was not supposed to be automatic, but the Superintendent decided that in some cases it would be. Accordingly, he pre-stamped a batch of forms ordering cancellation and ordered officials to hand them out whenever they received notice of certain classes of convictions. The court thought that while efficiency was commendable, the exercise of discretion required decisions to be made on a case-by-case basis and only after the consideration of the merits of each case.

(3) A policy may serve a variety of functions within an organization. It is a way for organizational leaders to confine subordinates' decisions within certain tolerances. It increases the probability of consistent decision-making and enhances the predictability of outcomes. These objectives are desirable, but consistency is only one value in decision-making and it is possible to be consistently wrong [54] It is also possible that non-routine cases may require a new solution and it is precisely these kinds of cases that discretions are intended to meet. The danger with informal policies is that they may be seen as an end in themselves and may promote bureaucratic inertia and inflexibility. It follows from this that an agency is not bound to follow blindly its own previous decisions or policies.[55]

In some instances the policy is only for internal organizational use[56] and as long as it is not applied in any given case there can be no objection to this. On the other hand these internal guidelines may affect the rights and interests of personnel within the agency and must not conflict with the personnel law under which the agency operates.[57]

(4) There is evidence[58] that agencies use policies for political purposes especially to ward off criticisms of bias and subjectivity. In this sense policies act as a shield behind which to shelter and to avoid responsibility for decisions. It always seems more objective to say that a decision has been made in accordance with a policy than to say that the decision-maker has made a personal[59] choice, which of course he or she must always do.

(5) Agencies, unlike courts, often have an explicit duty to adjudicate individual cases or disputes and to formulate policy or develop practices in the policy arena concerned.[60] In the case of labour relations or industrial commissions, for example, not only must the agency decide a particular dispute, but it must also consider industry-wide and even

national matters. In some cases they may do this simultaneously when a wage case, for example, also lays down a bench mark for wage increases generally.[61]

(6) A policy may represent the accumulation of agency expertise in certain areas of administration. In this sense, policies may be useful to new members of the agency since they will not have to learn everything *de novo*. Even for existing officers, the policy reduces the pressure of starting the decision-making process afresh.[62] This allows the agency to screen out certain aspects of a problem that experience has shown need not be reconsidered.[63] There is a danger here in that this assumes that the policy is still relevant, and that either the problem has not changed in a fundamental sense or that perceptions of the problem have not changed.

(7) Policy represents a set of objectives or goals towards which an agency aspires. A policy statement may also include considerations that are intended to advance towards the goals of the policy, but the essential quality of a policy is its purposive nature. There is evidence that agencies may on occasion regard laws as only a means to attain policies and have expressed frustration with courts and tribunals that have apparently hampered progress towards the goals of the policy.[64]

Constitutionally, policy initiation and formulation is in the hands of the executive while policy interpretation and implementation is shared between the executive and the judiciary. It is usually at the point of application or implementation that conflicts arise between informal policy and the law. The Commonwealth Administrative Appeals Tribunal (AAT) has said on many occasions that it is not its role to formulate policy[65], though it has sometimes recommended that policies be re-formulated and even put in legislative form.[66] The main reason for this is an appreciation by the AAT that policy formulation requires skills that it lacks. A policy formulation exercise requires an evaluation of the present policy and a knowledge of all cases that have actually come before the agency - knowledge that the AAT lacks. Policy formulation also requires consultation with industry groups or the community, something that a tribunal cannot carry out.[67] In addition ministers are better able to take into account the political variables that are part of the policy formulation process,[68] a task which, if undertaken by a tribunal, would undermine its independence and make it the focus of partisan lobbying.

The problems arise when policies are implemented since policy implementation requires constant adjustment to the policy's content at the point where it is applied, in part, because policies formulated in an agency headquarters rarely appreciate the full complexity of the situation on the ground. This is one reason why there is a gap between what a policy prescribes and the reality of the policy in action.[69] Since agencies see cases in the mass while tribunals and courts see implementation on a case-by-case basis a considerable potential for conflict arises. Agencies tend to ignore the details of the individual case though there is evidence that they will look to these matters if subject to external scrutiny.[70] In any case they assume that the other organs of government that review policies are merely being obstructionist while administrators are acting in the interests of managerial efficiency. But as a British judge said over fifty years ago sometimes "convenience and justice are not on speaking terms."[71]

For courts and tribunals, in contrast, policy is normally seen as a means to an end, especially in the judicial review jurisdiction. In any case the rule of law asserts the supremacy of law over policy. One consequence of this difference of perspective is that lawyers see compliance with law as an end in itself, while administrators see law as a means to an end. It is not surprising then that the

executive and the judiciary should conflict in this area of the law.

The problems with administrative policy

While administrative policy may be useful, excessive reliance on it may engender certain problems. First, policy is rarely written with the precision of legislation and thus may actually be rather unclear. Where this is the case the courts will generally not inspect it too closely.[72] On the other hand unclear policies run the risk of either being interpreted in ways adverse to the agency's objectives or being regarded as inapplicable in a given case. On occasion the courts and tribunals have been very critical of policy on the grounds that it was vague and poorly drafted.[73]

Secondly, ascertaining the terms of the policy may be difficult. In some cases the court may require disclosure for the purposes of judicial review.[74] In other cases statutes either allow for policy announcements to be made or require that they be made and in some instances require that they be published in a certain form and in a certain outlet such as a government gazette. Two policies on the same subject matter may exist and it may not always be clear which is the operative policy at any particular time.[75]

Thirdly, there is a risk that the agency will prefer its policy to the extent that it assumes that the policy is the sole variable in the decision-making equation. This might mean that both relevant legal criteria and the merits of the individual case are simply not taken into account at all.[76]

Fourthly, the policy might induce laziness and encourage a lack of imagination in decision-makers. Administrators may stop searching for better answers. This would be a particular problem in a turbulent policy environment where past solutions had calcified in unexamined policy and may prove to be an unsuitable response to a new situation.

The basic legal rules

The courts accept and even welcome informal policy[77] for any of the reasons stated above, but they have laid down certain rules for its use.

(1) The policy must be relevant to the subject-matter and purposes of the statute[78], other relevant statutes[79], and even the Constitution if it is relevant.[80] One of the central concerns of the courts has been to ensure that all relevant factors are taken into account in making decisions while at the same time insisting that no irrelevant matters may be considered. The problem is to decide what is relevant or not. Many statutes lay down criteria that the decision-maker must take into account. Where the statute specifies criteria or at least the agency is confined to a relatively narrow function it may be easy to establish if a policy is relevant or not.[81] In one Victorian case the court held that it was irrelevant for a transport licensing agency to take into account a general government policy of favouring returned servicemen by denying a licence to an applicant who had not served in the armed forces.[82] There was no rational connection between fitness to operate a transport business and military service. In contrast where the policy is deemed to have a mandatory effect the court may conclude that it is a relevant consideration and that the failure of the agency to take it into account vitiates the decision.[83]

Sometimes, however, the specified variables are deliberately vague. An official who may or must consider the "need for services"[84] or the "standard of service" is given no guidance as to what these terms mean. Where the statute does not specify the matters to be taken into account the courts are likely to defer to an agency's judgment unless the policy is clearly irrelevant. The perception of what counts as relevant probably

changes over time. It is doubtful, for example, that if presented with the same matter today the High Court would agree that an agency could deny approval of a land transfer on the grounds that Italians do not make very good farmers especially where irrigation is concerned.[85]

The best example of a vague criterion is the expression "in the public interest". The public interest is virtually anything that the decision-maker decides it is, except matters that are obviously in someone's private interest and which have no public character.[86] One meaning of the term is that refers to matters wider than the merits of the individual case and embraces matters of concern to society at large.[87] On the other hand even where the term is used in a statute the first essential is to have regard to the statute as a whole for even the "public interest" may be confined by an exhaustive list of statutory criteria if the statute in question so provides.[88]

In other cases the statutory list may not be complete. The decision maker must turn to the statute as a whole to discern its objectives or policy.[89] Unfortunately not all statutes disclose policies[90], and if they do, these may conflict with each other. The objective of health and safety legislation is clear: to promote health and safety. But this is not an objective to be pursued at all costs. Agencies are aware that they may close down factories or restaurants that pose a major threat to health, but are loath to do so unless the case is clear and compelling.[91] Such cases are rare: more usually the threats are minor. Closure in these cases may throw people out of work and create even greater problems for the unemployed, the owners and other government agencies.

Partisan political factors are always irrelevant. A decision-maker cannot act or refuse to act merely, or even largely, in order to avoid criticisms in the legislature[92] or even by the press or public. Nor can elected officials take decisions to thwart statutory objectives because they do not agree with them, or have been elected on a platform to oppose them.[93] On the other hand it is recognised that in some instances, especially where decisions are taken at the highest levels, the public interest may require that public opinion be considered and be to that extent political.[94] This point has emerged in parole decision-making especially where the person seeking parole has a notorious past.[95] The distinction between the two classes of "political" cases is that the decision-maker in the first class of case has only considered his or her own political position while in the second case wider public interest considerations are at stake. This may not be conceptually satisfactory as a distinction but the courts are here trying to deal with political realities as well as to maintain the integrity of the decision-making process.

There may be other grounds upon which a policy may be attacked such as that it is unreasonable in a *Wednesbury*[96] sense though attempts to mount such attacks have generally failed. Thus in a recent case an English court held, in what it called a 'hard case', that the policy of excluding homosexuals from the armed forces was not irrational or contrary to European human rights standards as these did not have the status of law in England.[97] Again policies that are applied in violation of the requirement to accord a fair hearing[98] or which are misinterpreted may constitute an error of law and may be reviewable on that ground.[99]

(2) The policy, if relevant, must not be cast in a rigid form nor may it be applied in an inflexible manner[100], unless of course the policy is explicitly sanctioned by statute.[101] A decision-maker must not fetter his or her discretion by adopting or applying rigid no-exceptions policies.[102] Whether such a policy exists is a matter of evidence[103] and whether, if it does exist, it has been applied in an inflexible manner is also a matter of fact.[104] Nor may decision-makers adopt policies that conflict with their statutory powers. The

classic statement of this view was made in 1919 when it was said:[105]

> There are on the one hand cases where a tribunal, in the honest exercise of its discretion, has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case...[If] the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.

There are various reasons for this doctrine. Firstly, a rigid policy would have the effect of turning an informal policy into a rule of law and that would be tantamount to giving policy legislative status. That in turn might evade the legal requirements of rule making and various forms of legislative review of rules made under statute. Secondly, rigid policies ignore the fundamental legal requirement that discretionary decisions are to be individual and only made after consideration of the merits of the individual case.[106] This means that the decision-maker must consider the possibility that a particular case is an exception to the policy, but is still within the ambit of the law. If the decision-maker does not display an open-minded attitude in this respect, he or she might fall into the error of supposing that the policy is the law, and that it is the only variable in the decision-making equation.[107] Thus a policy cannot be the only consideration nor can it ignore relevant statutory criteria or the merits of the individual case. In practice, decision-makers may have to consider: (a) relevant statutory criteria, (b) relevant policies, and (c) the merits of the individual case. The merits are always relevant though they may not be always decisive.

The evaluation, including the weight, of these variables is left to the decision-maker,[108] and he or she may (perhaps inevitably) attach more weight to the policy than to other factors.[109] This may occur where the policy is well established, has been formulated with the agreement of the industry and even represents international policy.[110] In the case of the jurisprudence of the Commonwealth AAT there is explicit recognition that generally greater weight will be accorded to policies made or approved by ministers and which are also subject to legislative scrutiny than those that merely emanate from the public service and are not subject to parliamentary review.[111]

A decision-maker is however constrained by two considerations when weighing or evaluating policy. First, he or she must not fail to consider all relevant factors or attach so little weight to them that the decision-maker appears to have failed to consider the matter properly.[112] Secondly, if a statute indicates the relative weight of certain factors the decision must reflect that requirement.[113] Where the policy indicates the relative weight of various factors the reviewing agency may take this into account but is not absolutely bound by this statement.[114] As long as the decision-maker approaches the matter in accordance with these considerations it is legally permissible for an agency to arrive at the same result in all cases. The fact that the same result is arrived at in all cases decided so far is not evidence, in itself, of a rigid policy.[115]

(3) A decision-maker must listen to arguments that request either that the policy be changed, or that an exception be made in an individual case, even if that entails allowing further exceptions to those already allowed in the policy statement.[116] In cases where it is proposed to apply an existing policy the onus is on the agency to justify the application of the policy; it is not the duty of the applicant in such cases to bear the burden of showing that the policy ought not to be applied.[117]

(4) A policy must not be adopted that effectively biases a decision-maker. Bias in law refers to a situation in which a decision-maker has either a direct financial interest in a decision or has pre-determined the outcome of a decision. Most commonly, problems arise from pre-determination. Pre-determination may arise either during proceedings where hostility or other indications suggest bias, or from acts, including statements, made outside the proceedings.

Bias does not include a general policy posture or the leaning of the mind in a certain direction. The courts recognize that administrators, especially when they handle many cases, or where the statute requires a certain policy posture, often have general ideas about the subject-matter. An unbiased mind is not an empty mind nor is it free of opinions. That would be unrealistic. It is common, for example, for agencies to announce policies for the reasons we saw above. This is not bias, unless, of course, the policy is cast in a rigid form[118] or is one that is clearly intended to determine a particular case. In one High Court decision the status of a policy announcement by the Commonwealth Conciliation and Arbitration Commission was considered.[119] The Commission, which had the dual role of resolving individual wage disputes and of regulating wages policy as a whole,[120] had announced that "where industry conditions permit" it would favour an equal pay for equal work policy. One reason for making the announcement was the hope that employers and employees would voluntarily comply with this policy. A group of employers challenged the competence of the Commission to hear a particular case on the grounds that the announcement was bias by predetermination. The High Court concluded that the announcement did indicate a general policy posture, but its terms also indicated a flexible attitude to its implementation.[121] The case might have been decided differently if the Commission had announced that in every case without exception the policy would apply. The court also pointed out the benefits of encouraging agencies to announce their policies, and that to hold otherwise might discourage policy-making in general, or at least, drive it underground.

Can an agency when presented with a case that also raises policy issues consider the policy issues before deciding the merits of the individual case? In a recent case in Ontario it was held that an agency may discuss a particular case for the purposes of policy-making even before a final decision is made in that case.[122] This is permissible if at the policy-making stage no decision is made in the case and nothing transpires at the meeting that should be brought to the notice of the parties in the case.

Emerging problems

One of the difficulties that has arisen in recent cases is whether an agency is bound by its announced policies. We considered earlier what the decision-maker must do where an exception to a policy is sought. Here we will consider situations where a citizen seeks to hold an agency to its policy. A related question is whether or not an agency may depart from its policies and, if so, are there any constraints on this process?

(a) Adherence to Existing Policies

It was once thought that because informal policies are not in legal form they could be changed whenever the agency was inclined to do so.[123] One reason for the emergence of informal policies was that they were supposed to be very flexible: no legal formalities were required to change them. The courts have had other ideas. In a major decision in 1983 the Privy Council, on an appeal from Hong Kong, held that as long as it is consistent with good administration the government is bound by its announced policies.[124] In that case a promise was made by the Hong Kong government that illegal

immigrants from Macau would have their cases decided on the merits of each case. On the facts the authorities did not so consider one application and the Privy Council allowed the appeal against the immigration department decision to send the applicant back to Macau. The promise, be it noted, was as to process and did not commit the Director of Immigration to any particular substantive outcome. Holding the Director to the promise did not infringe the no-fettering rule, but rather upheld the fair hearing requirement, something that Bankes LJ noted in the *Kynoch case* as essential in decisions involving the application of policy.

The law now is that in situations where an agency promises a hearing before a decision is made, or where there exists a practice of granting such a hearing, the agency must adhere to this promise or practice while the policy in question remains in place.[125] This view was followed in other Commonwealth jurisdictions including Australia.[126]

An alternative argument for holding an agency bound by its promises may be found in the *Verwayen* decision.[127] That case concerned whether a promise made by the Commonwealth not to contest liability in a negligence action and not to rely upon the statute of limitations was binding or could be departed from. The court held that the Commonwealth was bound by its promise and did so apparently on the basis that a departure would be unfair in this case. The effect of this decision which has yet to be applied to a purely administrative matter would be to prevent second thoughts by agencies where this would work injustice. The benefit of the *Ng Yuen Shiu* line of cases is that it does not prevent an agency from changing its policy and probably does not prevent departures from existing policy in individual cases where this can be justified. What it does prevent is the inexplicable or irrational non-application of an announced policy.

There are situations where the requirement that an agency adhere to its announced policies will not apply. Firstly, if it is clear on the face of the promise that it is not intended to be binding, or is clearly temporary in nature, then the agency will not be bound by it or bound by it beyond the time limit, if any. If the announcement is in the nature of a general intention rather than being highly specific, then no legitimate expectation to a hearing will be created by it. On the other hand if the promise is highly formal, or the context indicates that it is intended to be binding, or the policy has been published in a clear form or even repeatedly published over a long period then the government will be bound by it. Lastly, if an agency publishes in non-legal form advice that is erroneous in law, then the court may examine such advice or policy.[128]

On the other hand it is unlikely that a promise of a particular substantive outcome would be held binding, unless it were in a valid legal form such as a contract, since this could be attacked either as bias by pre-determination or as a fettering of a statutory discretion. Even promises of certain types will not be upheld if they are contrary to well known principles of constitutional law. Thus the executive cannot promise not to exercise legislative powers and agree not to introduce legislation.[129] Such an undertaking is a fettering of legislative powers and almost certainly unlawful.[130]

Secondly, any promise or practice must be consistent with the law. An agency cannot agree to overlook all breaches of the law, though it may choose in an individual case to take no enforcement action. An agency does have a general duty to enforce the law, but within this general duty it may, in individual cases, decide not to enforce the law. What the agency cannot do is adopt a policy or practice not to enforce a particular law at all or decide on substantial non-enforcement.[131] To hold otherwise would be tantamount to allowing the executive

to suspend or dispense with the operation of the law.[132] If, by reason of genuine resource limitations, full enforcement is not possible the courts will allow selective enforcement though they must be satisfied that an illegal policy is not in place.[133] The courts also recognise that resource limitations will mean that priority may have to be given to some problems rather than others and that more personnel may have to be allocated to some activities and districts than others. On the other hand, where there is a clear duty to enforce, the agencies will be allowed little latitude not to act.[134]

(b) Changes to existing policies

The law on policy change is less clear. The problem is that if any agency were bound forever to adhere to existing policies it would become a prisoner of its policies. If it were discovered that a policy is outdated or even mistaken an agency should be permitted to change it.[135] So far no case has held that a policy cannot be changed at all. In one recent case[136] it was said that a policy could be changed at any time, but there appear to be rules governing these changes.

If an agency announces a policy, it cannot secretly change it. That is, the decision-maker cannot allow the announced policy to stand while operating the new policy behind the scenes. This would be grossly unfair since an applicant would frame an application on the basis of the announced criteria only to discover that a different set of secret factors were operative in such a case.[137] If the decision-maker wants to change the policy he or she must first give those who are relying on the current policy an opportunity to make representations as to whether, in the particular case, criteria and procedures different to those set out in the newly announced policy ought not to be followed.[138] Even if an expectation exists that consultation will occur before a policy is changed this does not prevent a policy from being changed.[139] In other words there is no legitimate expectation that a policy will never be changed and such expectations as exist based on past policy may come to an end when a new policy is announced.[140] The right to change a policy is inherent in the system of government and in any case as circumstances change so may policies. This may arise from a reconsideration of a previous policy which is discovered on rational grounds to be erroneous or mistaken.[141] If the new policy is lawful the courts will leave it alone.[142]

Of course the new policy may create new expectations. It is also clear that an agency should ensure that the policy does not retrospectively disadvantage persons. Three situations may be distinguished here:

- if a policy is in place and a person applies for it to operate in his or her case the existing policy should be apply.

- If on the other hand an application is made and before the decision is taken the old policy is replaced by a new policy then the decision ought to be made under the old policy.[143] There seem to be two bases for this. The first is that a new policy should be prospective in nature and if introduced after the decision-making process has begun would not apply. Second, a policy introduced during the process, or even worse, during the hearing itself would be a denial of natural justice since the applicant did not know of it before the decision-making exercise in his or her case commenced.[144]

- If a policy is changed and then an application is made the agency may apply the new policy.[145] The existence of an expectation that an existing policy would continue to apply does not prevent the agency from lawfully changing its policy and applying the new policy to new cases before it. Were it otherwise persons with an expectation based on the old

policy could use that expectation to prevent policy change altogether.

If the change of policy is actuated by malice or bad faith or is intended to achieve objectives outside the scope of the legislation or is a decision made by someone with no authority in the matter and is imposed upon the decision-maker, then such a policy will not be upheld.[146]

The problem here is that as public servants must obey the lawful and reasonable order of their superiors; but as holders of independent grants of statutory power they must make up their own minds and not be dictated to by superiors or abdicate their powers. If the legislature, by statute, designates a particular officer or class of officer as having certain powers then no other person however exalted may intervene and dictate a decision, unless of course, that is allowed by the legislation. This rule is designed to prevent shifts in decision-making contrary to the legislative scheme thereby frustrating the intention of the legislature and possibly endangering the assignment of legal responsibility. On the other hand, there is a need for central policy direction and coordination, especially in very large departments with many officers. Many statutes confer discretionary power upon individual officers (e.g. police officers), but it runs contrary to everything that is known about complex organisations to suppose that these officers may act completely independently of all other officers in the same organization. One of the objectives of the leadership in such organizations is to ensure a degree of consistency in the exercise of these powers. The courts have accepted that an organizational leader may require prior consultation before certain types of actions are taken,[147] but also have held that organizational leaders cannot fetter independent grants of discretionary power by rigid policies. [148]

Another way of reconciling these apparently conflicting principles is either to give an official the statutory power to intervene or to make sure that directives from the Executive Council are cast in general and not rigid terms.

(c) Specifying permissible departures from policy

We saw above that an agency cannot have a policy, in the absence of statutory authority to do so, that there will be no exceptions to the policy. [149] In contrast some agencies, rather than leaving the matter at large, have attempted to structure decision- making by indicating a list of permissible departures as part of the policy.[150] If it is made clear that the list is for guidance only and is not intended to be exhaustive it will probably survive review by the courts.[151] One way of achieving this result is not to specify the list of permissible departures but to indicate that departures will only be allowed in special or exceptional cases without saying what they are.[152] At the very least indicating explicitly that exceptions may be allowed is regarded as desirable decision-making practice.[153] Not all agencies do this especially if they wish silence on the matter to act as an unstated deterrent to such requests, but those that do need to recognise that the list can never be so rigid that they will never consider any exceptions to their own list of exceptions. There is always the possibility that an applicant will make a case for a new departure not identified by the agency and such arguments must be heard[154] even if they are eventually rejected.[155] On the other hand, the agency may have been sufficiently imaginative that in practice its list of allowable departures actually exhausts the possibilities to date.[156]

(d) Publicizing policies and changes in policy

It seems to be elementary that the existence of a policy ought to be made known to those likely to be affected by it. Certainly courts have recommended this[157] and it is hard to see how a policy intended to guide applicants[158] can be of

use to them if they do not know about the policy in question. In most of the cases on policy the policy was known to the applicant and thus the issue of availability was not considered by the court or tribunal reviewing the decision.[159] In the few cases where availability of the policy was an issue it seems that the weight of authority supports the view that a policy must be drawn to the applicant's attention. In a number of cases, the courts have stressed that a fair hearing will be worthless if the applicant does not know that a policy may be challenged or an exception sought.[160] In most of the cases on the role of policy, the policy was known in one way or another, and in some instances the courts have insisted that this been done. In a recent case from Alberta a draft policy that had not been formally promulgated prior to the proceedings and which was not known or available to the applicant was held not to be applicable and the secrecy surrounding it was held to amount to a denial of procedural fairness. The court held that although the policy was formally adopted during the course of the actual hearing this did not rescue the situation for the respondent in that case.[161] If this decision is followed in Australia agencies will not be able to spring a new policy on an unsuspecting applicant and it is submitted that this must be in principle the correct view of the law.

At present there are statutes that make provision for publication of policies in particular cases and some of the Freedom of Information Acts require policies be made available to the public.[162] Some FOI statutes create an incentive to comply on the grounds that an agency may not apply a policy that has not been made available.[163] But publication is not a universal requirement[164] and Australia is not alone in this. Even in the very open American system policy statements need not be published under the notice and comment requirements of the *Administrative Procedure Act 1946* (US).[165] Even where a policy is to be generally available it is permissible for the agency to delete information if the information would otherwise result in the document being an exempt document.[166]

The only other example of a general enactment that directly addresses the question of policy availability is the Victorian *Administrative Appeals Act 1984*. In that statute before the tribunal is obliged to apply a policy the tribunal must be satisfied that the policy was drawn to the attention of the applicant or the applicant could be expected to be aware of it or that it has been published in the *Government Gazette*.[167]

All other examples of a publication requirement are specific to the particular statute concerned. Some insist that policy be laid before Parliament[168] or that the policy be published in the *Government Gazette* or even a newspaper.[169]

Rescuing an invalid policy by severance

If a policy comprises a number of parts that are separable without doing damage to the whole the courts might, where they find a policy to be defective in part, exercise the option of severing the bad from the good.[170] If, on the other hand, the policy is so inter-related in its parts that this cannot be sensibly done then the whole policy will fall. If the policy comprises conditions, as is often the case in local planning matters, the severance option may rescue a policy.

Conclusion

Administrative agencies may adopt and apply policies provided that they are relevant to the subject matter of the governing legislation and are within the scope of the general law. The policies adopted by an agency may either be their own or those of other officials or departments provided that they are relevant, are independently evaluated at the point of implementation and are not blindly followed. When adopting a policy

the agency should avoid rigid "no exceptions" policies, unless the legislation permits this. If the agency wants to adopt such a policy it should seek to have this written into the legislation. In any case, the agency must keep its mind open and intimate what its policy is to those affected by it and also allow them to make representations either that the policy not apply to them or that the policy be changed. An agency cannot argue that it is not the policy to announce agency policies or that it is not the policy to grant exceptions. In either case the agency would have, de facto, granted the policy the status of law which it does not have.

An agency may change its policies, but as long as the policies remain in place the agency must adhere to them. Decision-makers cannot suddenly depart from policies or operate a secret policy while continuing to promulgate a publicly announced policy. If a policy change is made all those affected ought to be notified and allowance made to hear their representations when the policy is applied to their case. In any case, the new policy should operate prospectively and not be changed out of malice or spite or in order to achieve improper objectives.

Endnotes

1 See W A Robson, *Justice and Administrative Law* 3rd edn (London: Stevens & Sons, 1951) p 432.

2 *Bates Case* (1606) 2 St Tr 371, 389(Exch)(the King's power is most properly named "Pollicy and Government" and "The matter in question is material matter of state, and ought to be ruled by the rules of pollicy"). It seems that the word policy came into use in this sense at the end of the sixteenth century: see *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, 23(CA) citing a statement made in 1599.

3 *Gardner v Dairy Industry Authority* [1977] 1 NSWLR 505, 534(CA). See also *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 452(HCA); *Bread Manufacturers of NSW v Evans* (1980-81) 180 CLR 404, 416-417(HCA); *Smithkline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357, 372-373(HC); *Barnett v Minister for Housing* (1991) 31 FCR 400, 403(Gen Div

4 *In re Sooka Nand Verma* (1905) 7 WALR 225, 229 (WA SC). For judicial statements to this effect see: *R v Bolton ex parte Beane* (1987) 162 CLR 514, 518(HCA); *R v Farlow* [1980] 2 NSWLR 166, 170(CCA); *Hayes v Commissioner of Succession Duties* [1970] SASR 470, 480-490(SC).

5 For this distinction see: *Becker v Minister for Immigration & Ethnic Affairs* (1977) 15 ALR 696, 701(AAT); *NSW Mining Ltd & Day v Attorney General* [1967] 1 NSWLR 621, 635-636(CA).

6 *Committee on Ministers Powers* (London: HMSO. 1932) Cmd 4060.

7 In *Koowarta v Bjelke-Petersen* (1981-82) 153 CLR 168(HCA) the effect of upholding the validity of the *Racial Discrimination Act 1975*(Cth) was to override a Queensland cabinet policy forbidding Aboriginal groups from acquiring tracts of Crown land.

8 *R v Ministry of Defence ex parte Smith* [1996] 2 WLR 305, 337H-338A(CA).

9 Such as military matters: see *Smith* ibid, and some areas of national economic policy: *Hammersmith LBC v Environment Secretary* [1991] 1 AC 521(HL(E)).

10 *Re The Queen in Right of Ontario and Ontario Public Service Employees Union.* (1987) 33 DLR(4th) 299, 304(Ont HCJ).

11 See *R v Walsall JJs* (1859) 18 JP 757; *R v Sylvester* (1862) LJMC 93. *Sylvester* was cited by the High Court in *Randall v Northcote Corporation* (1910) 11 CLR 100, 111.

12 "The interface between policy and discretion in the exercise of statutory powers is a difficult one". *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 194(FCA FC) per Fox & Franki JJ.; "A most difficult question in administrative law is in what circumstances a departure from rules and principles by reference to which decisions are taken but which are not statutory, that is to say are not set out in legislation, may invalidate a decision": *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 10(Gen Div) per Davies J.

13 Many holders of statutory powers are lawyers, but most are not, nor does the law require them to be. In mainstream administrative writing in Australia the emphasis is on the most visible aspects of decision making ie that by tribunals such as the AAT, which has legal members; but most statutory powers are not in the hands of such quasi-judicial agencies.

14 For judicial usage in this vein see: *James v Pope* [1931] SASR 441, 463(SC); *Crouch v Minister of Works* (1976) 13 SASR 553, 558(SC); *Leppington Pastoral Ltd v Department of Administrative Services* (1990) 23 FCR 144, 156(Fed Ct); *Auckland Regional Council v North Shore City Council* [1995] 3

NZLR 18, 23(CA For a statutory example of this usage see: *Freedom of Information Act 1991*(SA) s 4(1).

15 *Re Dainty and Minister for Immigration and Ethnic Affairs* (1987) 6 AAR 259, 266(AAT); *Re Secretary, Department of Social Security and Bosworth* (1989) 18 ALD 373. 375(AAT).

16 *NZ Co-operative Dairy Co v Commerce Commission* [1992] 1 NZLR 601, 610(HC)

17 *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287, 299b-c.(FC), *Re Bryer and Secretary, Department of Social Security* (1987) 13 ALD 334, 336(AAT); *Re Webster and Minister for Veterans' Affairs* (1990) 21 ALD 583, 584(AAT); *Minister for Human Services & Health v Haddad* (1996) 137 ALR 391, 399(Fed Ct- Full Ct)

18 *Re Becker* (1977) 15 ALR 696, 701(AAT)

19 *Seldan Pty Ltd v Liquor Licensing Commission* [1990] VR 1009, 1014(SC).

20 *Green v Daniels* (1977) 51 ALJR 463, 466(HCA); *Hook v Registrar of Liquor Licences* (1980) 35 ACTR 1, 5.

21 *Stott v Minister for Immigration and Ethnic Affairs* (1985) 59 ALR 747, 749(Fed Ct)

22 *Weir Family Supermarket v Liquor Licensing Commission* [1992] 1 VR 305, 311(App Div).

23 *Shire of Gatton v Gelhaar* (1966) 10 LGRA 228(Qld FC), *Parker v Commissioner for Motor Transport* (1970) 91 WN(NSW) 273, 275(SC); *R v Minister For Sea Fisheries ex parte Byrne* Tas SC No M242/1987(15 September 1987) p 10; *The Parole Board ex parte Palmer* (1993) 68 A Crim R 324, 325(Tas SC).

24 *Re Pigdon and Minister for Veterans' Affairs* (1989) 19 ALD 658, 661(AAT); *Re Williams and Defence Service Homes Corporation* (1989) 10 AAR 565n, 569n(AAT) ; *Re Currie and Secretary, Department of Veterans' Affairs* (1991) 13 AAR 282, 284(AAT)

25 *Hughes v DHSS* [1986] AC 776, 784H(HL(E)); *Somerville v Dalby* (1990) 69 LGRA 422, 427(NSW Land & Envir Ct); *R v Minister For Sea Fisheries ex parte Byrne* Tas SC No M242/1987(15 September 1987) p 5

26 *Hamood v Forsyth v Tower Hotel Pty Ltd* (1972) 58 LSJS 565, 568; (1972) 3 SASR 496, 500 FC).

27 Agency here is taken to be a synonym for any decision-maker in the executive branch of government with statutory powers of decision and includes ministers and secretaries as well as collective decision-makers such as a commission or authority; as well as tribunals with both adjudicative and policy making functions. For a statutory definition see *Freedom of Information Act 1991*(SA) s 4(1).

28 *Re Aston* (1985) 4 AAR 65(AAT); *Environmental Protection Act 1993*(SA) s 28(5)(a)

29 See for example *Freedom of Information Act 1982*(Cth) s 3. In some cases there is explicit reference to the policy making function of the agency. See for example: *Environmental Protection Act 1993*(SA) ss 26-33. See also *Morton v Union Steamship Co of NZ Ltd* (1951) 83 CLR 402. 410 (HCA); *Carjay Pty Ltd v Superintendent of Licensed Premises* (1972) 3 SASR 484, 490(FC); *Curtis v Beaudesert Shire Council* (1982) 48 LGRA 8(Qld FC). Statutory policy may also be cast in the form of subordinate legislation: *Rosemount Estates Pty Ltd v Minister for Urban Affairs & Planning* (1996) 90 LGERA 1, 19(NSW Land & Environment Ct).

30 Whether the courts are any better than administrators at formulating a distinction between policy and other matters is an open question as the courts have acknowledged: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 468-469(HCA) per Gibbs CJ. See also the extra-judicial comments of Brennan J (originally in his paper "The Purpose and Scope of Judicial Review" in M Taggart(ed), *Judicial Review of Administrative Action n the 1980s*(Auckland: OUP, 1986) p 20) cited in *NCA(Brisbane) Pty Ltd v Simpson* (1986) 13 FCR 207, 225-226(FC) where he is quoted as having written: "The courts are not very good at formulating or evaluating policy".

31 *Lewins v ANU* (1996) 133 ALR 452, 463(Fed Ct) per Lee J.

32 *Re Aston and Secretary to the Department of Primary Industry* (1985) 4 AAR 65, 74-78(AAT) ("Policy is not law. A statement of policy is not prescription of binding criteria", "Policy is not a legislative prescription..."); *Minister for Industry and Commerce v East-West trading Co Ltd Ltd* (1986) 10 FCR 264, 269(FC) per Fox J; *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 10-11(Gen Div); *Re Dainty and Minister For Immigration and Ethnic Affairs* (1987) 6 AAR 259, 266(AAT); *Williams and Defence Service Homes Corporation* (1989) 10 AAR 565n, 567n(AAT).

33 *Re Habchi and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 623, 631(AAT); *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 12(Gen Div)("...such rules are of a non-binding character". *Re Uyanik and Minister for Immigration, Local Government and Ethnic Affairs* (1989) 10 AAR 38, 43(AAT)

34 *Marlborough Education Board v Blenheim School Committee* (1897) 15 NZLR 551, 556(SC

35 *Re Becker and Minister for Immigration and Ethnic Affairs.* (1977) 15 ALR 696, 700(AAT)"Where a policy-maker forms a policy to govern or effect the exercise of his statutory discretion, the policy must conform

to law." per Brennan J). See also: *Santos Ltd v Saunders* (1988) 49 SASR 556, 569(FC).

36 *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 195(FC of FCA) (Policy is difficult to define

37 Many policies are not called policies . See *Independent Holdings Ltd v City of Adelaide Planning Commission* (1994) 63 SASR 318, 323(FC) where the policy was embodied in "The Principles of Development Control".On the other hand many policies are actually forms of subordinate legislation: *Rosemount Estates Pty Ltd v Minister for Urban Affairs & Planning* (1996) 90 LGERA 1, 19(NSW Land & Environment Ct).

38 *Riddell v DSS* (1993) 42 FCR 443, 450(FC

39 *Elston v State Services Commission* [1979] 1 NZLR 210, 238(SC); *R v Roberts* [1908] 1 KB 407, 435(CA): "It is not easy to draw the line between policy and administration, or give a definition..." This is also a problem in the Ombudsman legislation which allows investigations into matters of administration but not policy per se, except at the point a policy is applied in which case it becomes a matter of administration. *Salisbury City Council v Biganovsky* (1990) 70 LGRA 71, 74-75, (1990) 54 SASR 117, 120-121(SA SC); *Booth v Dillon(No 2)* [1976] VR 434, 439(SC).

40 *Re Cole's Sporting Goods Ltd* (1965) 50 DLR(2d) 290, 297(Ont CA).

41 *Crouch v Minister of Works* (1976) 13 SASR 553, 558(SC); *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169, 175(Fed Ct).

42 See the policy in issue in *British Oxygen Ltd v Minister of Technology* [1971] AC 610, 623f-g(HL(E)). See also at 635 where Lord Reid says: "But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say...." In *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18, 23(CA) Cooke P said: "Counsel ... are on unsound ground in suggesting that ....policy cannot include something highly specific".

43 Thus Freedom Of Information legislation commonly refers to rules and practices: *Freedom of Information Act 1982*(Cth) s 3(a); *Freedom of Information Act 1991*(SA) s 3(2)(a).; *Freedom of Information Act 1989*(NSW) s 6(1); *Freedom of Information Act 1992*(Qld) s 7. c f *Freedom of Information Act 1989*(ACT); *Freedom of Information Act 1982*(Vic); *Freedom of Information Act 1991*(Tas); and *Freedom of Information Act 1992*(WA) which have no such comparable definitions.

44 Though of course it is to be found there and judges sometimes assume that where the decision maker is a minister policy considerations will be involved: *G H Michell & Sons (Australia) Pty Ltd v Minister of Works* (1974) 8 SASR 7, 32(FC) per Zelling J. It should be noted that if by policy the courts mean factors other than those in the statute the relevance of these considerations will be a matter of statutory construction.

45 See *Acre Pace Projects Ltd v Registrar of New Westminster Land Title District* (1982) 133 DLR(3rd) 418, 423(BCSC)

46 *R v Registrar of Gun Licences ex parte Barabas* (1966) 9 FLR 229, 235(ACT SC); *Grace v Registrar of Firearms* (1984) 113 LSJS 390(SA LC); *Re P and Commissioner of Police* (1987) 9 AAR 12(AAT)

47 *City of Perth v Fairway Heights Pty Ltd* [1981] WAR 51, 57(FC).

48 *Minister for Immigration etc v Gray* (1994) 50 FCR 189, 206e-f(FC); R v *Minister for Sea Fisheries ex parte Byrne and Smith* Tas SC No 47/1987 List A, M242/1987(15 September 1987) p 9 citing *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 625(HL(E)). One empirical indication of the huge numbers of decisions actually made was given in 1989 when it was reported that between 1981-1989 the Social Security Department made 16 million decisions only 1,380 of which were referred to the Administrative Appeals Tribunal: D Volker, " "The Effect of Administrative Law Reforms: Primary-Level Decision Making", (1989) 58 *Canberra Bulletin of Public Administration* 112-115.

49 *Britten v Pope* [1916] AD 150, 158(AD).

50 *Re Lewis & Superintendent of Motor Vehicles* (1980) 108 DLR(3d) 525(BC SC).

51 *Re Oliver et al* VG No 140 of 1984 (17 September 1984) Federal Court- General Division. p 6.

52 For an excellent understanding of this see *Crouch v Minister of Works* (1976) 13 SASR 553, 559(SC).

53 *Re Lloyd & Superintendent of Motor Vehicles* (1971) 20 DLR(3d) 181(BC CA).

54 *Nevistic v Minister of Immigration & Ethnic Affairs* (1981) 34 ALR 639, 647(Fed Ct) per Deane J.

55 There is no doctrine of administrative precedent ie that an agency is bound by law to follow previous decisions: *Hall v Vaucluse MC* (1947) 16 LGR 139, 142(NSW Land & Val Ct).

56 Jerry L Mashaw, *Bureaucratic Justice* (New Haven: Yale UP, 1983) p 213.

57 *Phillips v Department of Immigration* (1994) 48 FCR 57, 72-73(Gen Div).

58 Jeffrey Jowell, *Law & Bureaucracy: Administrative Discretion & The Limits of Legal*

Action (Port Washington: Mass: Dunellen, 1975).

59 This is not to be confused with a private choice ie according to private beliefs or values: *Singer v Statutory Officers Remuneration Tribunal* (1986) 5 NSWLR 646, 569c-d(CA) per Kirby P.

60 See for statements of this role: *Pezim v British Columbia* (1994) 114 DLR(4th) 385, 409(SCC) ; *CJA Local No 579 v Bradco Construction Ltd* (1993) 102 DLR(4th) 402, 416(SCC).

61 See *Ex parte Angliss Group* (1969) 122 CLR 546(HCA) for an Australian example of this phenomenon.

62 *Noel v Chapman* 508 F2d 1023, 1030 (2nd Cir, 1975) "..one of the values of the policy statement is the education of agency members in the agency's work."

63 *Starr v FAA* 589 F2d 307, 312(7th Cir, 1978).

64 Stephen Argument,"Quasi-Legislation: Greasy Pig, Trojan Horse or Unruly Child". (1994) 1 *Aust J of Admin L* 144 at 150-151 and 159 citing various public servants.

65 *Re Drake (No 2)* (1979) 2 ALD 634, 644(AAT); *Re John Holman & Co Pty Ltd and Minister for Primary Industry* (1983) 5 ALN N219; *Re Currie and Secretary, Department of Veterans' Affairs* (1991) 13 AAR 282, 290(AAT).

66 *Re P and Commissioner of Police* (1987) 9 AAR 12 (AAT).

67 *Rendevski & Sons and Australian Apple and Pear Corp* (1987) 12 ALD 280, 285(AAT).

68 *Re Dainty and Minister For Immigration and Ethnic Affairs* (1987) 6 AAR 259. 266(AAT).

69 The work done in England by Robert Baldwin has explored this problem in detail. See his paper: "Why Rules Don't Work", (1990) 53 *MLR* 321-337.

70 D Volker. "Commentary", in (1981) 12 *Fed L Rev* 158, 161-162; Kosmas Tsokhas, "Managerialism, Politics and Legal Bureaucratic Rationality in Immigration Policy", (1996) 55(1) *Aust J of Public Admin* 33-47 at 39-40, 41.

71 *General Medical Council v Spackman* [1943] AC 627, 638(HL(E)) per Lord Atkin.

72 *Bell & Colville Ltd v Environment Secretary* [1980] JPL 823, 825(QBD)

73 *Phillips v Secretary, Department of Immigration and Ethnic Affairs* (1994) 48 FCR 57, 81C-E(Gen Div); *Gerah Imports Pty Ltd v Minister For Industry, Technology and Commerce* (1987) 17 FCR 1, 10(Gen Div).

74 This is now the established practice in New Zealand: *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 554-555, 561-562, 568(CA); *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348, 352(CA); *Attorney General v New Zealand Maori Council* [1991] 2 NZLR 129, 136(CA).

75 *Re The Commonwealth of Australia and Frank El-Hassan* No 429 of 1984 (1 October 1985) Federal Court - General Division para 19.

76 *Re MT, KM, NT and JJ and Secretary, Department of Social Security* (1986) 9 ALD 146, 150(AAT)

77 *McCartney v Victorian Railways Commissioners* [1935] VLR 51, 66 (FC), *In re Gosling* (1943) 43 SR(NSW) 312, 317(CCA); *Legal Services Commission of NSW v Stephens* [1981] 2 NSWLR 697, 701(CA); *R v Clarkson* (1982) 148 CLR 600, 612-613(HCA); *Thurecht v DCT* (1984) 3 FCR 570, 588-589(Gen Div); *Coco v DCT* (1993) 43 FCR 140, 147 (Gen Div)(Fed Ct). The best single account is to be found in *Re Drake (No 2)* (1979) 2 ALD 634, 640-641, 642-643(AAT).

78 *Hall v Vaucluse MC* (1947) 16 LGR 139, 143(NSW Land & Val Ct) ;*Green v Daniels* (1977) 51 ALJR 463, 468(HCA); *Croft v Minister of Health* (1983) 45 ALR 449, 464-465(Fed Ct); *Hindi v Minister For Immigration and Ethnic Affairs* (1988) 20 FCR 1, 16(Gen Div); *Bryant v DCT* (1993) 26 ATR 541, 542(Fed Ct FC).

79 It is now arguable that a policy that is discriminatory on an impermissible ground might be struck down: *Re Partridge and Manitoba Securities Commission* (1990) 63 DLR(4th) 564, 572g-h(Man QB)

80 *James v Pope* [1931] SASR 441(FC)

81 *Ex parte S F Bowser & Co, Re Randwick MC* (1927) SR(NSW) 209, 215-216(SC) See also *R B Agencies (SA) Pty Ltd v Pope* [1970] SA Licensing Court Reports 14, 16(FC); *Marks v President etc of Swan Hill* [1974] VR 896, 904(SC).

82 *R v Transport Regulation Board ex parte Ansett* [1946] VLR 166, 177(SC)

83 *Minister for Human Services and Health v Haddad* (1996) 137 ALR 391, 399-400(Fed Ct - Full Ct)

84 See *Family Radio v Australian Broadcasting Tribunal* (1991) 28 FCR 584, 588(Gen Div)

85 *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492(HCA). The argument available in *Koowarta* based on the *Racial Discrimination Act 1975*(Cth) was not available in 1947. Even so the policy in *Water Conservation* seemed to be of the cast-iron variety and was applied without regard to the merits of the particular case. See Rich J at 497.

86 A matter may be in both a private and public interest: Thus a private company that tenders successfully for a public contract will be fufilling its own interests while it builds a public road, for example. *United Building Corporation Ltd v City of Vancouver Corporation* [1915] AC 345, 353(PC)

87 *Findlay v Home Secretary* [1985] AC 318, 335c-d(HL(E)); *R v Mott* (1994) 75 A Crim R 74, 82(Qd CA);*Whithair v Attorney-General* [1996] 2 NZLR 45, 52(HC).

88 *Howard Hargrave Pty Ltd v Penrith MC* (1958) 3 LGRA 260(NSW Land & Val Ct); *In re Thompson* [1964] Tas SR 129, 144(FC).

89 *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997, 1030b-d (HL(E)).

90 For example see: *McCartney v Victorian Railways Commissioners* [1935] VLR 51, 64(FC) upheld in (1934) 52 CLR 383(HCA).

91 Keith Hawkins, "Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation", (1983) 5(1) *Law & Policy Quarterly* 35-73.

92 *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997 (HL(E)).

93 *Bromley LBC v GLC* [1983] 1 AC 768(HL(E)).

94 See *R v Radio Authority ex parte Bull* [1996] QB 169, 183A-184C, 188A-B(DC) (Political means pertaining to policy or government)

95 *South Australia v O'Shea* (1987) 163 CLR 378, 410(HCA); *Palmer* (1994) 72 A Crim R 555, 559(Tas SC); *Cornwell v Attorney-General of the Commonwealth* (1993) 45 FCR 492; *Ex parte Fritz* (1992) 59 A Crim R 132, 134(Qd CA).

96 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223(CA). See for example: *Sydney Harbour Tunnel Co Ltd v B & CI Corp* (1989) 31 IR 193, 205(NSW Ad Law Div)(dictum);*Rosemount Estates Pty Ltd v Minister for Urban Affairs & Planning* (1996) 90 LGERA 1, 21-22, 4041(NSW Land & Environment Ct) per Stein J.

97 *R v Ministry of Defence ex parte Smith* [1996] 2 WLR 305(CA). The court noted at p 315E-F that the policy was different on this matter in Australia.

98 *Minister for Immigration etc v Gray* (1994) 50 FCR 189, 207a-c(FC)

99 *Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 17 FCR1, 15(Gen Div) ; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 78(Gen Div);*Assignment Pty Ltd v Kirby* [1981] Qd R 129, 134A-B(FC).

100 *Pope v Maynorth Pty Ltd* [1966] SASR 885, 88(FC); *Arkarba Hotels Pty Ltd v Superintendent of Licensed Premises* [1968] SASR 122, 127-128(FC); *D'Oro v Superintendent of Licensed Premises & Kiley* [1968] SASR 220, 225(FC); *In re John Martin & Co Ltd* (1974) 8 SASR 237, 243(FC). One way of explaining this has been to say that a policy may guide but it may not control a decision: *Re The Commonwealth of Australia and Frank El-Hassan* No 429 of 1984 (1 October 1985) Federal Court - General Division para 23. Cf *Shiro of Gatton v Colhoar* (1966) 20 LGRA 228(Qd FC) where a policy was cast in rigid terms but the decision maker considered a departure from it.

101 *Octet v Grimes* (1987) 68 ALR 571, 583(Fed Ct); *Skoljarev v Australian Fisheries Management Authority* (1996) 133 ALR 690, 696(Fed Ct. The *Environment Protection Act 1993*(SA) s 27(1)(b), (3) and s 34 permits mandatory policies to be given legislative status and enforceable as such.

102 *Parker v Commissioner for Motor Transport* (1970) 91 WN(NSW) 273, 279(SC).

103 *King-Brooks v Roberts* (1991) 5 WAR 500(FC)

104 *Commissioner for ACT Revenue v Alphaphone Pty Ltd* (1994) 49 FCR 576, 592-593(FC)

105 *R v Port of London Authority ex parte Kynoch Ltd* [1919] 1 KB 176, 184(CA) per Bankes LJ. This passage has been cited often in Australia see: *R v Clarkson* (1982) 148 CLR 600, 612-613(HCA); *Ex parte S F Bowser & Co; Re Randwick MC* (1927) 27 SR(NSW) 209, 214(SC); *Meyer Queenstown Garden Plaza Pty Ltd v City of Port Adelaide* (1975) 11 SASR 504, 521(SC); *NCA(Brisbane) Pty Ltd v Simpson* (1986) 13 FCR 207, 223(FC); *Opara v NSW Medical Board* (1986) 6 NSWLR 544, 560(Ad Law Div); *Chumbairux v Minister for Immigration & Ethnic Affairs* (1987) 74 ALR 480, 492-493(Fed Ct); *Perder Investments Pty Ltd v Lightowler* (1990) 25 FCR 150, 157-158(Gen Div); *R v Minister of Sea Fisheries ex parte The National Australia Bank Ltd* FC of Tasmania FCA No 100 of 1990(11 June 1991);*R v Queensland Fish Management Authority ex parte Hewitt Holdings Pty Ltd* [1993] 2 Qd R 201, 204(FC).

106 Consideration of the merits is a fundamental in the exercise of any statutory discretion. For statements of this principle in the policy context see: *Greek Australian Finance Corp Pty Ltd v Sydney City Council* (1974) 29 LGRA 130, 143(NSW SC); *Goulburn City Council v Carey* (1975) 32 LGRA 277, 291(NSW SC); *Re Drake (No 2)* (1979) 2 ALD 634, 640(AAT); *Legal Services Commission of NSW v Stephens* (1981) 2 NSWLR 697, 703c-d(CA); *Magill v Santina Pty Ltd* (1983) 1 NSWLR 517, 531f-g(CA);*Seldan Pty Ltd v Liquor Licensing Commission* [1990] VR 1009, 1013(SC); *Minister for Immigration etc v Gray* (1994) 50 FCR 189, 206f-g(FC);*Skoljarev v Australian Fisheries Management Authority* (1996) 133 ALR 690, 695(Fed Ct); *Administrative Decisions(Judicial Review) Act 1977*(Cth) s 5(2)(f).

107 *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666, 684; *Australian Trade Commission v WA Meat Pty Ltd* (1987) 75 ALR 287, 292(Fed Ct- FC); *Rendell v*

Release on Licence Board (1987) 10 NSWLR 499, 503G-504B, 505G-506A(CA);*Transx Ltd and Reimer Express Lines Ltd* (1986) 28 DLR(3d) 392, 410(Man CA).

108 *Tabag v Minister of Immigration & Ethnic Affairs* (1982) 45 ALR 705, 715-716(Fed Ct)

109 *R v Minister For Sea Fisheries ex parte Byrne* Tas SC No M242/1987(15 September 1987) p 12.; *Ansett Transport Industries(Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54, 62(HCA) Per Gibbs J.

110 *Kenya Aluminium and Industrial Works Ltd v Minister of Agriculture* [1961] EA 248, 253(EA CA)

111 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 32 FLR 469, 474-475 (AAT); *Pigdon v Minister for Veteran's Affairs* (1987) 10 AAR 560, 562-563(AAT); *Re Webster and Minister for Veterans' Affairs* (1990) 21 ALD 583, 587 para 16(AAT).

112 *Whim Creek Consolidated NL v Colgan* (1989) 25 FCR 51, 54-55(Fed Ct); *Gumus v Minister For Immigration, Local Government and Ethnic Affairs* (1991) 30 FCR 145, 147(Fed Ct).

113 *Bath Society v Environment Secretary* [1992] 1 All ER 28, 38B, 42J(CA)

114 *Uyanik and Minister For Immigration, Local Government and Ethnic Affairs* (1989) 10 AAR 38, 45(AAT).

115 *Re North Coast Air Services Ltd* (1973) 32 DLR(3d) 695, 701(Fed CA).

116 *R v Council of the Town of Charleville ex parte Corones* [1928] St R Qd 155, 162(FC); *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble(Offshore) Fisheries Ltd* [1995] 1 All ER 714, 731d-e(QBD)

117 *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758, 774E(NPD).

118 See for example: *Taylor v Isitt* (1891) 9 NZLR 678, 684(SC).

119 *R v Commonwealth Conciliation and Arbitration Commission ex parte Angliss Group* (1969) 122 CLR 546(HCA).

120 *Ex Parte Angliss Group* op cit 553

121 Where an agency rejects an application on the grounds of non-compliance with its policy this is not bias per se especially if the evidence shows that the agency considered the merits and did not close its mind to the applicant's case: *Bennett v Dental Board of Queensland* SC No 494 of 21993(25 February 1994)

122 *Re Consolidated Packaging Ltd and International Woodworkers Union* (1987) 31 DLR(4th) 444, 448(Ont CA).

123 *Peninsula Anglican Boys' School v Ryan* (1987) 7 FCR 415, 430(Fed Ct) ("Moreover, policy considerations change from time to time; sometimes quickly and frequently. The inconvenience and delay attendant upon giving notice of each shift of the wind is obvious". per Wilcox J).

124 *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 638e-h(PC).

125 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 401D(HL(E)).

126 *R v Ward* (1983) 34 SASR 269, 283-284(FC); *Cole v Cunningham* (1983) 49 ALR 123, 132(Fed Ct).

127 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394(HCA).

128 *Gillick v West Norfolk Area Health Authority* [1986] AC 112, 193G-H(HL(E)) per Lord Bridge.

129 *Rothmans v Attorney General* [1991] 2 NZLR 323, 331(HC).

130 The "almost" leaves to door open to the possibility that the proposed legislation may be unlawful. But to date no court has prevented a bill likely to conflict with the Constitution from being introduced on the ground that it may be ultra vires the constitution or other governing legislation because there is a possibility that the Legislature may amend it thereby obviating the problem. See :*Trethowan v Peden* (1930) 31 SR(NSW) 183(FC) and the cases cited in *Cormack v Cope* (1974) 131 CLR 432(HCA); *Eastgate v Rizzoli* (1990) 20 NSWLR 188(CA).

131 *R v Commissioner of Police ex parte Blackburn* [1968] 2 QB 118(CA)

132 See *Churchill Fisheries Export Pty Ltd v Director-General of Conservation* [1990] VR 968(SC)

133 *King-Brooks v Roberts* (1991) 5 WAR 500(FC)

134 *R v Commissioner of Police, Tasmania ex parte North Broken Hill Ltd* (1992-3) 1 Tas R 99, 114(SC)

135 *Blyth District Hospital Inc v SA Health Commission* (1988) 49 SASR 501, 523(SC).

136 *Peninsula Anglican Boys' School v Ryan* (1987) 7 FCR 415, 430(Fed Ct)

137 *Biswanath v Director of Medical Education and Training* AIR 1982 Orissa 106, 108(Orissa HC)

138 *Willara v McVeigh* (1984) 54 ALR 65, 117(Fed Ct)

139 *R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299(CA); *Council of Civil Service Unions v Minister for the Civil Service* [1985]]AC 375(HL(E)); *R v Great Yarmouth BC ex parte Bottom Brothers Arcades Ltd* (1988) 56 P & CR 99(QBD); *R v Transport Secretary ex parte Richmond LBC* [1994] 1 All ER 577, 595a-d(QBD).

140 *Hughes v DHSS* [1985] AC 776, 788(HL(E)).

141 *R v Health Secretary ex parte US Tobacco* [1992] QB 353, 369g-h(DC)

142 *Attorney-General of NSW v Quin* (1990) 170 CLR 1, 17(HCA).
143 *Re Habchi and Minister for Immigration & Ethnic Affairs* (1980) 2 ALD 623, 631 (AAT) per Davies J
144 *Gleason v Lethbridge Community College* [1996] 3 WWR 377, 381, 383(Alta QB).(Sexual harassment policy introduced during the hearing itself: otherwise not known to or available to the applicant).
145 Thus where the AAT criticized a previous policy the agency changed its policy and applied the second policy in a subsequent decision: *Re Rendevski & Sons Ltd and Australian Apple and Pear Corp* (1987) 12 ALD 280, (AAT).
146 For examples of this see: *R v Minister Administering the Fisheries Act 1963 ex parte National Australia Bank Ltd* Tas SC, No M139 of 1990(9 October 1990) pp 20-21.
147 *R v McAulay ex parte Fardell* (1979) 2 NTR 289(SC)
148 *Sernack v McTavish* (1968) 15 FLR 381(ACT SC); *Zayen Nominees Pty Ltd v Minister For Health* (1983) 47 ALR 158, 189(Fed Ct).
149 *Randall v Northcote Corporation* (1910) 11 CLR 100(HCA); *Sydney Harbour Tunnel Co Ltd v Building Construction Industry Long Service Payments Corporation* (1989) 31 IR 193, 205(NSW Ad Law Div).
150 *Grace v Registrar of Firearms* (1983) 113 LSJS 390, 394(SA LC)(This case should be approached with caution since the court approved of this practice which amounted to not allowing any further additions. This is a mis- statement of the applicable principle.
151 *Skoljarev v Australian Fisheries Management Authority* (1996) 133 ALR 690, 696(Fed Ct)
152 *Legal Services Commission of NSW v Stephen* (1981) 2 NSWLR 697, 705b-d(CA).
153 *Smith v Wyong Shire Council (No 2)* (1980) 41 LGRA 202, 215(NSW SC)
154 *Legal Services Commission of NSW v Stephens* (1981) 2 NSWLR 697, 702c-d(CA)
155 The merits of the individual case may not be sufficient to override the policy: *P W Adams Pty Ltd v Australian Fisheries Management Authority* (1995) 22 AAR 96, 114(Fed Ct)
156 *R v Minister of Agriculture,Fisheries and Food ex parte Hamble(Offshore) Fisheries Ltd* [1995] 2 All ER 714, 723a-b(QBD).
157 *Mohoupt v Redland Shire Council* (1975) 31 LGRA 309, 312(Qld Local Govt Ct); *Haines v Ipswich City Council* (1974) 27 LGRA 153, 157(Qld Local Govt Ct)
158 *Re Maple Lodge Farms Ltd* (1982) 137 DLR(4th) 558, 561(SCC)
159 In *Re John Holman & Co Pty Ltd and Minister For Primary Industry* (1983) 5 ALN N219(AAT) the policy was produced at the hearing but the tribunal disposed of the matter by deciding that the policy conflicted with the statute.
160 For an exception to this see *Peninsula Anglican Boy's School v Ryan* (1987) 7 FCR 415, 430(Fed Ct) where it was held that it would not be a breach of natural justice for a minister to fail to notify affected persons of changes of policy. This case has only been followed once since: *Chamberlain v Banks* (1985) 7 FCR 598, 600 and should not be followed on this point.
161 *Gleason v Lethbridge Community College* [1996] 3 WWR 377, 381, 383(Alta QB) per Hembroff J.
162 In the *Freedom of Information Act 1993*(SA) s 10(10)(c) there is an obligation on agencies to make each of their policy documents available for inspection and purchase by members of the public.
163 Ibid s 10(3).
164 While all FOI statutes allow access some do not have a mandatory requirement of making this material available in the absence of a specific request.
165 5 USC Code Sec 553(b)(3)(A), (d)92)(1994 edn).
166 *Freedom of Information Act 1993*(SA) s 10(2).
167 s 25(3)(b).
168 *Environmental Protection Act 1993*(SA) s 30.
169 Ibid s 28(6).
170 *Smith v Wyong Shire Council (No 2)* (1980) 41 LGRA 202, 216-217(NSW SC)

PART 8 OF THE *MIGRATION ACT 1958*: THE NEW JUDICIAL REVIEW REGIME TAKES HOLD

*Refugee Review Tribunal**

Edited version of a paper presented to AIAL seminar, Recent Developments in Refugee Law, Sydney, 20 November 1996

The decision of the High Court in *MIEA v Wu Shan Liang & Ors*[1] has already been referred to for the important guidance it has provided on substantive aspects of refugee law. The High Court also made some important comments on the proper role of courts when engaged in judicial review.

The former Chief Justice, Sir Anthony Mason, in his recent address to an AIAL seminar entitled "Life in Administrative Law outside the ADJR Act" predicted that the decision would have a considerable impact on the course of judicial review. Sir Anthony stated that the decision was:

> First and foremost, a clear and specific warning ... against transforming judicial review generally, not merely review under ADJR Act, into merits review.[2]

In *Wu* the judicial review proceedings were brought under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). It is clear that the legislature shared the High Court's concern, and this was one of the reasons for the introduction of a new judicial review regime for decisions made under the Migration Act, which is more restrictive than the regime which has developed under the ADJR Act.

The new judicial review regime

Part 8 of the Migration Act was introduced on 1 September 1994 by the *Migration Reform Act 1992*, together with a number of other amendments to the Act. Part 8 sets out a distinct judicial review regime for "judicially reviewable decisions" as defined under section 475 of the Migration Act. These include decisions of the Refugee Review Tribunal, but not decisions of the Department of Immigration and Multicultural Affairs which are reviewable by the Tribunal.

Part 8 of the Migration Act effectively removes a section of administrative decision-making from the general framework of judicial review and constructs another mechanism for judicial review for those decisions.

In the second reading of the Migration Reform Act, the then Minister for Immigration, Gerry Hand, stated that the intention of Part 8 was to "make the application of the legal concepts of migration decision-making predictable".

To summarise the changes:

- First, the Federal Court does not have any other jurisdiction in relation to "judicially reviewable decisions" as defined, including under section 39B of the *Judiciary Act 1903*, or under the

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ADJR Act except as provided for under section 44 of the Judiciary Act.[3]

- Secondly, there is a strict time limit as to when an application for judicial review must be made, which the Federal Court has no power to extend.[4]

- Thirdly, the grounds of review are significantly limited in comparison with the grounds available under the ADJR Act. In particular:

  - review on the grounds of relevant and irrelevant considerations is excluded[5]

  - review on the ground of denial of natural justice is excluded,[6] although actual bias has been introduced as a separate ground[7]

  - review on the ground of unreasonableness is excluded[8]

  - there is no residual ground of "other" abuse of power or "otherwise contrary to law"[9]

In a comprehensive paper entitled "Judicial Review and Part 8 of the Migration Act - Necessary Reform or Overkill"[10] Dr Mary Crock set out the changes and discussed the reasons for the changes in some detail.

This paper will address a few of the recent judicial developments in relation to two aspects of the new regime - first, when it applies, and secondly, how it applies.

To which decisions does Part 8 apply?

After 1 September 1994, when Part 8 was introduced, the Federal Court proceeded on the basis that applicants could bring applications for review of refugee related decisions under the ADJR Act and section 39B of the Judiciary Act. This was presumably because of the view that there were accrued rights where the application to the Refugee Review Tribunal had been made prior to 1 September 1994. Neither the Minister nor the applicants took issue with this approach.

The jurisdictional question was finally considered in *Mahboob v MIEA & Anor*,[11] even though both parties had argued that the court had jurisdiction under the ADJR Act.

In *Mahboob,* the new provisions for judicial review had commenced after the applicant had applied to the Refugee Review Tribunal but before the Tribunal had made its decision. The question was whether the applicant had an accrued right to have his application determined in accordance with the law in force at the time his refugee application was made.

The Court found that where a Refugee Review Tribunal decision had been made on or after 1 September 1994, the applicant had no accrued right to make an application for judicial review under the ADJR Act. Despite the fact that both parties argued that there was jurisdiction, the Court found that it had no jurisdiction in this matter as the application to the Court was lodged out of time according to Part 8.

The issue of the applicability of Part 8 of the Migration Act was considered more recently by the Full Federal Court as a case stated in *Dai Xinh Yao v MIEA & Anor.*[12] Mr Dai was in a similar situation to Mr Mahboob, as he had applied to the Refugee Review Tribunal before Part 8 came into effect, and the Tribunal decision was made after Part 8 came into effect.

The Court did not find it necessary to decide whether the ability to seek judicial review could be an accrued right, as section 39 of the Migration Reform Act clearly expressed an intention that no rights were to accrue. Section 39 is a transitional provision which provides that refugee related applications made before 1 September 1994 and not finally determined at that time are to be treated as protection visa applications. The Court stated that

section 39 disclosed an unambiguous intention to rebut the presumption against retrospectivity and the presumption against the ousting of the court.[13] The decision in *Mahboob* was followed.

It is now clear that Part 8 applies to all decisions made by the Refugee Review Tribunal after 1 September 1994, regardless of when the primary decision was made, or the application for review to the Tribunal was lodged.

As a result of the uncertainty of the application of the review regimes of the ADJR Act and the Migration Act, a number of practitioners prepared parallel applications under both. In *Lal v MIEA*[14] the applicant did so, later abandoning the ADJR argument at trial. Although the applicant was successful, Madgwick J awarded part costs against him on the basis that he had put the respondent to the unnecessary extra expense of preparing the ADJR issue.

Judicial consideration of substantive grounds for review under Part 8 of the *Migration Act 1958*

As the scope of the application of Part 8 has only recently been settled, judicial consideration of the substantive grounds of review under Part 8 is only now starting to occur.

Unreasonableness no longer available as a ground of review (paragraph 476(2)(b)).

In *Velmurugu v MIEA*[15] Olney J confirmed that the Court had no jurisdiction to review a decision on the basis of unreasonableness under Part 8.

Natural justice (procedural fairness) no longer available as a ground of review (paragraph 476(2)(a))

Paragraph 476(2)(a) provides that denial of natural justice is not a ground of review. The Explanatory Memorandum (EM) notes that the rules of natural justice have been replaced by a codified set of procedures which will provide greater certainty in the decision-making process. This suggests that the "procedures" ground of review is likely to be relevant where a breach of the rules of natural justice is alleged.

Procedures not observed (paragraph 476(1)(a))

Paragraph 476(1)(a) provides a ground of review "where procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed".

The EM indicates that this ground of review is "complementary" to paragraph 476(2)(a) which provides that an application for judicial review cannot be made for a breach of the rules of natural justice.

The EM points out that the new decision-making scheme sets out:

> with greater certainty the procedural requirements to be followed to ensure that applicants are provided with the protection necessary to receive a fair consideration when decisions are made.

It was thought that the common law rules of natural justice were uncertain; so those rules were replaced by a codified set of procedures which would afford the same level of protection to individuals but would also have the advantage of greater certainty in the decision-making process.

The code of procedures to which the EM refers here is clearly the code of procedures under Part 2, Division 3, Subdivision AB of the Migration Act - "Code of procedure for dealing fairly, efficiently and quickly with visa applications". But this subdivision does not apply to the Tribunal's decision-making process, and decisions to which the subdivision does apply are not judicially reviewable.

It is understandable therefore that applicants have looked elsewhere for procedures which **do** apply to the Tribunal, and which might be covered by the "failure

to observe procedures" ground. The provision which applicants have generally sought to rely on is section 420.

Section 420 requires that:

(1) The Tribunal, in carrying out its functions under the Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.

These statutory requirements are an obvious means by which applicants for judicial review can attempt to reintroduce procedural fairness as a ground of review under the "procedures" umbrella.

Although a number of recent cases have dealt with this issue, the relationship between section 420 and the grounds of review under Part 8 is not yet clear.

In *Velmurugu v MIEA*,[16] the applicant argued that the Tribunal had not acted according to substantial justice and the merits of the case as required under paragraph 420(2)(b), and therefore had not observed a required procedure in making the decision (para 476(1)(a)).

Olney J found that the Tribunal did not fail to observe procedures required by the Act in failing to act according to the merits of the case. His Honour stated:

> The exclusion of the unreasonableness ground and the limitations placed upon the circumstances in which the no evidence ground can be relied upon are clear indications of an intention to restrict the opportunity to seek review on a basis which would involve a consideration of the merits of a case. A decision on the merits of a case does not involve a procedure and thus could not give rise to review on the ground described in s.476(1)(a).[17]

In *Wannakuwattewa v MIEA & Anor*[18] it was argued that the Tribunal had failed to observe the procedures required by section 420, in particular paragraph 420(2)(b). His Honour found that he did not need to determine whether section 420 establishes "procedures" for the purposes of paragraph 476(1)(a), because on any view the Tribunal had made no error.

In *Zakinov v Gibson & Anor*,[19] North J considered the same argument, and agreed with the conclusion of Olney J in *Velmurugu* that:

> a challenge to a decision on the merits does not involve a contravention of any procedure set out in s.420(2)(b) and thus cannot give rise to a review under s.476(1)(a)".[20]

In the more recent case of *Kulwant Singh v MIEA & Anor*,[21] North J added that it was doubtful that paragraph 476(1)(a) related to procedures which were not expressly stated in the Act - examples of expressly stated procedures being the obligation of the Tribunal to give an applicant the opportunity to appear (para 425(1)(a)) or the requirement for the Tribunal to give written reasons (section 430).

However, in the decision of the Full Federal Court in *Dai v MIEA* Davies J noted, *obiter*, that the procedures adopted by the Refugee Review Tribunal must be "fair" and "just" under paragraph 420(1)(a), and that if this did not occur in a particular case an applicant would be entitled to relief under paragraph 476(1)(a) of the Act (on the ground that the procedures required by the Act to be observed in connection with the making of the decision had not been observed).[22] This case suggests that the Court may be prepared to take a broad view of the "failure to observe procedures" ground in order to permit a consideration of procedural fairness issues.

Most recently, Drummond J in *Ma v Billings & Anor,*[23] firmly stated that section 420 imposed an obligation on the Tribunal to comply with the rules of natural justice, while paragraph 476(2)(a) prevented correction of a failure by the Tribunal to do so. He added that paragraph 476(1)(a) did not provide a ground for judicial review for breach of the rules of procedural fairness except where the Migration Act or Regulations themselves specified a particular aspect of the rules with which the Tribunal must comply - such as the obligation to provide an applicant with an opportunity to appear before it (para 425(1)(a)).[24]

The law in this area is clearly not yet settled. There appears to be a degree of tension between the judiciary's traditional attachment to the concept of procedural fairness as a central element of judicial review, and the intention of the legislature to ensure procedural fairness is complied with by setting out the requirements in a statutory framework rather than allowing a general ground of review. Put simply, there appears to be some tension between the power of the court and the power of the legislature to determine what is procedurally fair.

Error of law - error in interpreting the law or in applying the law to the facts (paragraph 476(1)(e))

The Federal Court has also considered whether a failure to comply with section 420 of the Migration Act may fall within the ground of review under paragraph 476(1)(e) - that the decision involved an error of law, being an error in interpreting the applicable law, or an error in applying the law to the facts as found.

In *Asrat v Vrachnas & Anor,*[25] the applicant claimed that the Tribunal had failed to put adverse information to him to allow him an opportunity to respond. His Honour dismissed the application, finding that there was no such failure on the part of the Tribunal. His Honour did observe that if adverse information came to the attention of the Tribunal, it was incumbent on the Tribunal to bring it to the attention of the applicant. If the Tribunal did not do so, and subsequently used that information against the applicant, this would be a failure to accord substantial justice (under paragraph 420(2)(b)). This would amount to an error of law under paragraph 476(1)(e) of the Act, being an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. His Honour expressly stated that such action would not constitute an error under paragraph 476(1)(a) - that is, it would not be a failure to observe procedures required to be observed.

In *Cruz v MIEA,*[26] the applicant sought to rely on paragraph 476(1)(e) but the Court found that the submissions were inviting the Court to enter into a reconsideration of the merits, and were based on "a complete misconception of the proper role of the Court and the practical restraints on judicial review".[27]

Whilst some of the decisions are in conflict as to which ground might cover a failure to accord procedural fairness, they do disclose a willingness on the part of the Federal Court to view a failure to accord procedural fairness as a reviewable error under the restricted grounds of review contained in Part 8.

Actual bias (paragraph 476(1)(f))

As stated above, reasonable apprehension of bias, available under the ADJR Act as part of the natural justice ground of review, has been excluded under Part 8. However bias remains available as a ground of review in the more limited form of "actual bias".

In *Wannakuwattewa v MIEA,*[28] North J found that to establish actual bias, the applicant had to show that the Tribunal had a closed mind to the issues raised and was not open to persuasion. Mere expression of doubt was not actual bias.

In *Sarbjit Singh v MIEA*[29] Lockhart J found that a preliminary conclusion about a particular issue involved in an enquiry is not sufficient to establish actual bias. His Honour also found that irritation, impatience, or even sarcasm do not establish actual bias. As in *Wannakuwattewa*, the Court found that actual bias exists only where evidence shows that preliminary views are incapable of being altered because the decision-maker has unfairly and irrevocably prejudged the case. These decisions confirm that the test for actual bias is very difficult to satisfy.

While it is now apparent which decisions fall within the ambit of Part 8 of the Migration Act, it is not yet clear how the Court will interpret the grounds of review. The EM to the Migration Reform Act spoke of the introduction of Part 8 as a move toward greater certainty. However, the few cases that have already dealt with the new judicial regime indicate that that certainty is yet to come.

Endnotes

1 (1996) 185 CLR 259.
2 Mason, Sir Anthony, *Life in Administrative Law outside the ADJR Act*, Australian Institute of Administrative Law Seminar, 17 July 1996, p.2.
3 *Migration Act*, s.485.
4 *Migration Act*, s.478.
5 *Migration Act*, s.476(3)(d) and (e).
6 *Migration Act*, s.476(2)(a).
7 *Migration Act*, s.476(1)(f).
8 See eg *Migration Act*, s.476(2)(b).
9 *Migration Act*, s.476(3)(g).
10 Australian Institute of Administrative Law Forum, 11-12 April 1996.
11 (1996) 135 ALR 693 [see also supplementary judgment of 15 April 1996].
12 Federal Court of Australia, Black CJ, Davies and Sundberg JJ, 18 September 1996, unreported.
13 Federal Court of Australia, Black CJ, Davies and Sundberg JJ, 18 September 1996, unreported, at 16 per Black C.J and Sundberg J.
14 Federal Court of Australia, Madgwick J, 24 September 1996, unreported.
15 Federal Court of Australia, Olney J, 23 May 1996, unreported.
16 Ibid.
17 Federal Court of Australia, Olney J, 23 May 1996, unreported, at 7.
18 Federal Court of Australia, North J, 24 June 1996, unreported.
19 Federal Court of Australia, North J, 26 July 1996, unreported.
20 Federal Court of Australia, North J, 26 July 1996, unreported, at 14-15.
21 Federal Court of Australia, North J, 21 November 1996, unreported.
22 Federal Court of Australia, Black CJ, Davies, Sundberg JJ, 18 September 1996, unreported at 17.
23 Federal Court of Australia, Drummond J, 13 December 1996, unreported.
24 at 15-18
25 Federal Court of Australia, O'Loughlin J, 23 August 1996, unreported.
26 Federal Court of Australia, Whitlam J, 31 October 1996, unreported.
27 at 5, referring to *MIEA v Wu* (1996) 185 CLR 259.
28 Federal Court of Australia, North J, 24 June 1996, unreported.
29 Federal Court of Australia, Lockhart J, 18 October 1996, unreported.

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